
amnesty international

UNITED STATES OF AMERICA

**The threat of a bad example:
Undermining international
standards as "war on terror"
detentions continue**

A damaging unilateralism

States which demonstrate a high degree of respect for human rights are likeliest to contribute to international security and well-being.

United States Secretary of State Colin Powell, 31 March 2003¹

Launching the State Department's latest report on human rights in other countries in March, Secretary of State Colin Powell spoke of the "steadfast commitment of the United States to advance internationally agreed human rights principles worldwide... As we lead an international campaign against terrorism, we are also working to extend the blessings of freedom at home and abroad". In a letter to a US Senator in June, the Pentagon's General Counsel stated that the administration "fully share[s] your concern for ensuring that in the conduct of this war against a ruthless and unprincipled foe, the United States does not compromise its commitment to human rights in accordance with the law".² In July, the Assistant Secretary of State for human rights wrote to Amnesty International: "It is the policy of the United States Government to pursue human rights and the rule of law as a central element of foreign policy. The US approach to countering terrorism does not conflict with or violate this policy".³

Actions, however, speak louder than words, and some of the US administration's actions since 11 September 2001 threaten to erode international law and standards forged over the past half-century or more.⁴ Prior to the invasion of Iraq, diplomat John Brady Kiesling resigned from the US Foreign Service. He wrote in his resignation letter to Secretary Powell: "We are straining beyond its limits an international system we have built with such toil and treasure, a web of laws, treaties, organizations, and shared values that sets limits on our foes far more effectively than it ever constrained America's ability to defend its interests".⁵

A less than wholehearted approach to international standards on the part of the USA is not new – this is a country that has been slow to commit itself to human rights treaties and has attached unprecedented conditions to some of those it has ratified.⁶ Recently, however, this reluctance appears to have come closer to outright rejectionism. The USA's active opposition to the International Criminal Court is a case in point. Its worldwide campaign to have US nationals exempted from the Court's jurisdiction coincided with the US administration's own plans to try selected foreign nationals by military commissions – executive bodies, not independent and impartial courts. Similarly, the USA's attempt to block the Optional Protocol to the United Nations Convention against Torture, which will establish a system of regular visits to places of detention, came at a time when the government was denying international human rights organizations access to hundreds of detainees held in its "war on terror".⁷

A report by an independent US government watchdog agency – the Justice Department's Office of Inspector General – published in June 2003, found there were "significant problems" in the treatment of non-US nationals detained in the initial post September 11 sweeps in the USA.⁸ Hundreds of people were held, often for months, on minor visa violations in harsh conditions, and were deprived of rights including prompt access to attorneys.⁹ While the US government has undertaken to reform some of its procedures in

response to that report, no such scrutiny has been permitted in the case of the hundreds of non-US nationals who continue to be held outside the USA in its ongoing “war on terror”.

The Department of Defence continues to hold hundreds of foreign nationals without charge or trial in the US Naval Base in Guantánamo Bay in Cuba. Many have been held there for more than a year in conditions the totality of which may amount to cruel, inhuman or degrading treatment. None was granted prisoner of war status or brought before a competent tribunal to determine this status as required by the Geneva Conventions. None has had access to any court or to legal counsel. Visits by family members have not been granted, thereby drawing relatives into the distress of this indefinite and unchallengeable detention regime. On 3 July 2003, it was announced that President Bush had named six detainees under the Military Order he signed in November 2001, making them eligible for trial by military commission. Any such trial would contravene international fair trial norms, and any executions carried out after such trials would violate minimum international safeguards applying to capital cases.

Detainees have been held incommunicado in US bases in Afghanistan. Allegations of ill-treatment have emerged. Others have been held in incommunicado US custody in undisclosed locations elsewhere in the world, and the US has also instigated or involved itself in “irregular renditions”, US parlance for informal transfers of detainees between the USA and other countries which bypass extradition or other human rights protections. Two US nationals have been held incommunicado for more than a year in military custody without charge or trial in the USA, having been designated as “enemy combatants” by the executive. A third man, a Qatari national, was recently removed from the criminal justice system by presidential order just before his trial. Such resort to executive power threatens to undermine not only international law but also the US criminal justice system itself.

The US Government would seem to attach importance to how the country is perceived abroad. For example, questioned about the international fallout from the revelation that children were among the Guantánamo detainees, the Secretary of Defence replied that “I do know that we care what the rest of the world thinks”.¹⁰ In 2002, an executive order signed by President Bush established the Office of Global Communications to promote the USA’s policies, including among other things, its oft-stated commitment to the rule of law, one example of what the administration calls the “non-negotiable demands of human dignity”. However, respect for human rights is not a public relations exercise, and rather than responding constructively to the widespread international concern about the detainees in US custody in Guantánamo Bay and elsewhere, the administration has largely ignored or rejected it.

Early on, Secretary of Defence Rumsfeld dismissed concern about the Guantánamo detainees as “based on the shrill hyperventilation of a few people who didn’t know what they were talking about.”¹¹ Later, the White House spokesman dismissed Amnesty International’s concern about the detainees as “without merit”¹². Such officials are at the same time rejecting the concerns of numerous organizations, courts, experts, and members of other governments. They include the former and current United Nations (UN) High Commissioners on Human Rights, the UN Working Group on Arbitrary Detention, the UN Special Rapporteur on the independence of judges and lawyers, the Inter-American Commission on Human Rights, the European Parliament¹³, the Parliamentary Assembly of the Council of Europe,¹⁴ and the

International Committee of the Red Cross. The UK High Court last November described the situation of the Guantánamo detainees as “objectionable” and “in apparent contravention of fundamental principles recognized...by international law”.¹⁵ A resolution in the UK Parliament described the detentions as “arbitrary and therefore unlawful”.¹⁶

According to Secretary Powell, “no country is exempt from scrutiny, and all countries benefit from constant striving to identify their weaknesses and improve their performance in this less-than-perfect world.”¹⁷ The US administration is not displaying an openness to such scrutiny, however. Not only is it seeking to keep the courts out of the equation, but international bodies too. In an opinion on the Guantánamo detainees, the UN Working Group on Arbitrary Detention wrote that it “deplores the lack of co-operation” of the US in responding to issues raised.¹⁸ In July 2003, the UN Special Rapporteur on the independence of judges and lawyers had still not received a response from the USA to the urgent appeal he sent on 16 November 2001 relating to the Military Order that President Bush had signed three days earlier. Asked about this, the Rapporteur replied: “The Bush administration...has not been very responsive to criticisms, and they have become a little intolerant to criticisms about themselves, but they are very free to criticize other governments when they violate human rights norms.”¹⁹

Amnesty International has been denied access to Bagram Air Base and to Guantánamo Bay. Its concerns about raised in numerous communications have remained largely unanswered. These are not signs, at least in regard to the USA’s own behaviour, that “the Bush administration is working in cooperation with governments, intergovernmental organizations, non-governmental groups and individuals to help bring human rights performance into compliance with international norms”, as Secretary of State Powell asserted last year.²⁰

Inside the USA, the damage being done to the country’s reputation abroad has been noted. The *New York Times* has described the plight of the Guantánamo detainees as a “scandal” which must be redressed. “Whoever they are, their treatment should be a demonstration of America’s commitment to justice, not the blot on its honor that Guantánamo has become.”²¹ Similarly, the *Chicago Tribune* has argued that “the image of the US holding hundreds of people for however long it wants without charge, trial or explanation violates the American tradition of justice. At this point Guantánamo seems to be tarnishing the image of the US, not protecting its security”.²² *Newsday* described the detainees as being “trapped in a twilight zone where their arbitrary designation as ‘enemy combatants’ affords them zero legal rights”, a situation which “undermines the United States’ reputation as a nation of laws”.²³

Secretary Powell seems to have come closer than some other administration officials to recognizing the damage being done to the reputation of the USA by its treatment of the detainees. In a reportedly “strongly worded” letter to Secretary of Defence Rumsfeld on 14 April 2003, citing complaints from the governments of eight allied countries whose nationals were among the prisoners, he wrote that the situation threatened to undermine international security co-operation.²⁴ Five weeks later Secretary Powell said that “Secretary Rumsfeld and I have been discussing how to expedite the movement of people out of Guantánamo” and had just concluded agreements with two countries, one of which was Saudi Arabia. He said that “we are working on all the other countries now, in an aggressive way, to see if we can clear up these cases, particularly if they involve people who are young”.²⁵

On 12 June 2003, the Swedish Foreign Minister met with Secretary Powell, and reiterated that it was unacceptable that Swedish national Mehdi Muhammed Ghezali was in Guantánamo without charge or trial after more than a year. She said that the Secretary of State “gave his word to engage in this particular case himself, which I see as positive.” She warned against expecting an immediate solution, however, as Secretary Powell “is not the sole influential voice in the Bush administration”.²⁶ A month later, the US Ambassador at Large for War Crimes Issues, Pierre-Richard Prosper, said that Mehdi Ghezali was not one of the prisoners slated for release in the near future.²⁷ Earlier, a US official had been reported as saying that the Swedish government’s criticism of the USA had not helped the prisoner’s situation.²⁸

The revelation on 3 July that two UK nationals were among the first six detainees to be named by President Bush as eligible for trial by military commission caused a furore in the UK. A statement was issued that President Bush and Prime Minister Blair were “confident that their experts will be able to agree on a solution that satisfies the mutual interests of the US and UK”.²⁹ It was later announced that the US had agreed, among other things, that the death penalty would not be pursued in the cases of the UK nationals and an Australian national, although the possibility of trial by military commission still loomed.³⁰ The Spanish government expressed the hope that it could obtain guarantees for its national and be able to get him “out of the legal limbo he has been in for the past year-and-a-half”.³¹

Governments should work in the interests of their nationals, but human rights are universal and non-negotiable – the fate of any detainee should not be dependent on alliances between countries. Governments should speak out firmly against all violations, including if an ally is the violator. As the President of the Council of Europe’s Parliamentary Assembly has said: “In the US military base on Cuba, hundreds of persons, including some children, are being detained without being charged of crimes or recognised as prisoners of war. The US authorities have created a status of “unlawful combatant” in order to deprive these detainees of many of the basic guarantees provided by international law and the US constitution. For many, including in the US, this practice qualifies as unlawful and we cannot remain silent – the defence of human dignity and the rights of all persons must be an essential part of our effort to eradicate terrorism around the globe.”³²

The USA has said that while it “will constantly strive to enlist the support of the international community in this fight against a common foe”, it will “not hesitate to act alone”.³³ To many observers, a unilateralist approach has seemed on occasion since 11 September 2001 to trample on the views of the international community, including in regard to the detention of those now held in US custody in Guantánamo and elsewhere.

The USA has contravened international law and standards in its treatment of detainees in its declared “war on terror” and it is setting a dangerous example in so doing. Double standards must end. International standards must be respected. As Secretary Powell said, states which demonstrate a high degree of respect for human rights are the most likely to contribute to international security and well-being. The US government – from the White House to the Pentagon, from the Department of State to the Department of Justice, from the Central Intelligence Agency to the Department of Homeland Security – should apply that thinking to its own conduct in relation to all those that come into its custody, at home or abroad.

A broad and open-ended “war”

The struggle against global terrorism is different from any other war in our history.

United States National Security Strategy, September 2002³⁴

The US administration has responded to the atrocities of 11 September 2001 by characterizing its response as a “war”. Its “war on terror” has indeed already seen two international armed conflicts – the invasions of Afghanistan and Iraq – but it has also consisted of an ongoing law enforcement effort at home and abroad. While the Justice Department continues to conduct investigations into “terrorism” within the criminal justice system, the US government has at the same time pursued a parallel system in which the executive has sweeping powers to detain, interrogate, charge or try suspects. Amnesty International believes that the executive has gone too far in this regard, arbitrarily framing a major part of the law enforcement effort in terms of war, and circumventing fundamental human rights safeguards in the process.

Symptomatic of this approach has been the Military Order on the Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism signed by President Bush two months after the 11 September attacks. This provides for the trial by military commission or indefinite detention without charge or trial of anyone suspected of being or having knowingly harboured either a member of *al-Qa’ida* or someone who has “engaged in, aided or abetted, or conspired to commit, acts of international terrorism”.³⁵ It is broad in scope and open-ended.

The Pentagon’s instructions for the military commissions extend the concept of armed conflict to include single hostile acts or attempted acts, or conspiracy to carry out such acts, a definition so broad that it could encompass many acts that would normally fall under the jurisdiction of the normal criminal justice system. The instructions specifically state: “This element does not require a declaration of war, ongoing mutual hostilities, or confrontation involving a regular national armed force. A single hostile act or attempted act may provide sufficient basis... so long as its magnitude or severity rises to the level of an “armed attack” or an “act of war”, or the number, power, stated intent or organization of the force with which the actor is associated is such that the act or attempted act is tantamount to an attack by an armed force. Similarly, conduct undertaken or organized with knowledge or intent that it initiate or contribute to such hostile act or hostilities would satisfy the...requirement”.³⁶

On 3 July 2003, it was announced that President Bush had named the first six detainees to fall under the provisions of the Order. None of them or anyone else named under the Order, whether tried or untried, will be “privileged” to seek, or have anyone seek on their behalf, in any court anywhere in the world, any remedy for any human rights violation that may have occurred against them, whether at the time of their arrest, during their detention, or during their trial by military commission. It is an attempt at unchallengeable executive power.

Following the naming of the six detainees under the Military Order, the United Nations Special Rapporteur on the independence of judges and lawyers stated that “in proceeding to apply these drastic measures to counter terrorism, the United States Government is seen defying United Nations resolutions, including General Assembly resolution A/RES/57/219 of 18 December 2002 and Security Council resolution S/RES/1456 of 20 January 2003”.³⁷ The

Rapporteur pointed out that these resolutions “reiterate very clearly that counter-terrorism measures must comply with international human rights law, humanitarian law and refugee law. It was the US that went to war with Iraq for breach of a Security Council resolution, and here we find the US blatantly defying these resolutions which they were party to.”³⁸

Despite framing its response in the language of “war”, the US administration has taken a selective approach even to the laws of war. It was quick to demand full adherence to the Geneva Conventions for the protection of its own captured soldiers after it invaded Iraq in March 2003. It was equally swift to apply a less stringent approach to its own conduct in the case of the Bagram and Guantánamo detainees, many of whom were taken into US custody in the context of the international armed conflict in Afghanistan, but none of whom was granted prisoner of war status or brought before a competent tribunal to determine status, as the Geneva Conventions require.³⁹ The International Committee of the Red Cross (ICRC), the authoritative interpreter of the provisions of the Conventions, disagrees with the US position on the detainees.⁴⁰ The United Kingdom Government also disagrees. The UK Parliamentary Under-Secretary of State for Foreign and Commonwealth Affairs said of the USA’s approach to the Geneva Conventions in regard to the Guantánamo detainees: “It is something that we have discussed with the United States, and frankly, we disagree with them about it.”⁴¹

Instead of applying the Geneva Conventions in full, the US executive has chosen to drop hundreds of those it has detained in Afghanistan and elsewhere into a legal black hole, outside the sovereign territory of the United States, out of the reach of the courts, under the label “enemy combatant”. According to the Pentagon “enemy combatant status may be used to describe an individual who, under the laws and customs of war, has become a member of or associated himself with hostile enemy forces, thereby attaining the status of a belligerent”.⁴² Again, the rules for military commissions apply a broad definition of the term “enemy”⁴³

The administration’s “war” scenario has also brought with it a disturbing attitude to the use of lethal force, or what President Bush has termed “sudden justice”.⁴⁴ In this context, broad definitions of “armed conflict” and “enemy” raise concern. In April 2003, for example, the USA responded to the concern of the UN Special Rapporteur on extrajudicial, summary or arbitrary executions that the killings in November 2002 of six men in a car in Yemen, blown up by an allegedly CIA-controlled Predator unmanned aerial vehicle, may have been extrajudicial executions. The US Government disagreed that “military operations against enemy combatants could be regarded as extrajudicial executions”, adding that the “conduct of a government in legitimate military operations, whether against Al Qaida operatives or any other legitimate military target, would be governed by the international law of armed conflict.” It concluded that “enemy combatants may be attacked unless they have surrendered or are otherwise rendered hors de combat”, and that any “Al Qaida terrorists who continue to plot attacks against the United States may be lawful subjects of armed attacks in appropriate circumstances”. It stated that the mandate of the Special Rapporteur does not extend to “allegations stemming from any military operations conducted during the course of an armed conflict with Al Qaida”, and that both the Special Rapporteur and the UN Commission on Human Rights lack competence “to address issues of this nature arising under the law of armed conflict”.⁴⁵

In Amnesty International's view, it is not at all clear why the laws of war would apply to this situation. Under existing international humanitarian law, it is not possible to have an international armed conflict between a state on the one hand and a non-state actor on the other, should the armed group not form part of the armed forces of a Party to the Geneva Conventions. The Geneva Conventions apply to situations of "armed conflict which may arise between two or more of the High Contracting Parties".⁴⁶ There is no armed conflict between the USA and Yemen, and the Yemeni authorities cooperated in the air strike.⁴⁷ In addition, there is no internal armed conflict between the government of Yemen (with the support of US forces) and *al-Qa'ida*. Accordingly, the proper standards applicable to this situation were law enforcement standards. The USA and Yemen should have cooperated to try to arrest these suspects rather than kill them. Rather than opting for killing them by remote control, lethal force should have been used only as a last resort.⁴⁸ To the extent that the US authorities deliberately decided to kill, rather than attempt to arrest these men, their killing would amount to extrajudicial executions.

As in the case of those killed in the car in Yemen, the US Government apparently takes the position that international human rights law and standards do not apply to detainees whom it has designated as "enemy combatants". For example, it holds that the mandate of the UN Working Group on Arbitrary Detention "does not include competence to address the Geneva Conventions of 1949 or matters arising under the law of armed conflict". What is more, it "disagrees with the conclusions reached by the Working Group that the individuals detained at Guantánamo are entitled to a review of the lawfulness of their detention". The USA maintains that there is "broad authority under the laws and customs of war to detain enemy combatants, without any requirement to bring criminal charges while hostilities last".⁴⁹ This situation may stretch far into the future. Despite "successes in Afghanistan and around the world", the US authorities said in late April 2003, "the war is far from over".⁵⁰ On 3 July, a senior Pentagon official stated that "the war on terrorism is open-ended".⁵¹

In some cases where detainees have been under the jurisdiction of the normal criminal justice system, the executive has stepped in to remove them. Jose Padilla, a US citizen arrested in May 2002 on alleged suspicion of conspiracy to detonate a radioactive "dirty bomb" in a US city, was originally held in the custody of the Justice Department and given access to an attorney. However, in June 2002 he was transferred to military custody after President Bush designated him as an "enemy combatant". Since then, he has been held in solitary confinement without charge or trial, and without access to an attorney or to his family in a navy jail in South Carolina. On 24 June 2003, President Bush declared Qatar national Ali Saleh Kahlah al-Marri to be an "enemy combatant" shortly before he was due to go to trial, and he too was transferred from Justice Department to Pentagon custody in South Carolina.

The very existence of a "parallel" system has a corrosive effect on the criminal justice system. The prospect of possible designation as "enemy combatant" and of transfer to indefinite detention without trial may coerce defendants into plea arrangements, as has already been alleged.⁵² Some could find themselves penalized for pursuing their rights, for example to cross-examine witnesses. The administration may yet transfer Zacarias Moussaoui, a French national facing conspiracy charges in connection with the September 11 attacks, out of the

criminal justice system and into military custody and possible trial by military commission if the federal courts rule against the government on the question of defence witnesses. Such a transfer would be another blow to the integrity of the criminal justice system.

Captured in Afghanistan, Yaser Hamdi was detained at Guantánamo until it emerged that he had US citizenship, at which point he was moved to military custody on the mainland. Over a year after the end of the international armed conflict in Afghanistan, he remained in untried military custody without access to counsel. In July 2003, the Fourth Circuit Court of Appeals rejected an appeal for the full court to reconsider an earlier decision of a panel of three of its judges allowing the government to continue the detention. A dissenting judge deplored the decision not to rehear the case. Judge Motz said that the original panel decision had marked “the first time in our history that a federal court has approved the elimination of protections afforded a citizen by the Constitution solely on the basis of the Executive’s designation of that citizen as an enemy combatant, without testing the accuracy of that designation”.⁵³

John Walker Lindh, a US national captured in Afghanistan at the same time as Yaser Hamdi, was allowed a lawyer and was brought before a federal district court for trial. In the event, a plea arrangement was struck, in which the state agreed to forego the right to treat Lindh as an unlawful enemy combatant in return for a guilty plea. A year later, Yaser Hamdi remains in untried military detention as an “enemy combatant”. Why were the two treated differently? In a country where race continues to play a role in the criminal justice system, such inconsistency may lead to speculation that the difference was that one was a middle class white Californian, and the other a young man born in the USA to Saudi parents. In any event, the Human Rights Committee, the body established by the International Covenant on Civil and Political Rights to oversee its implementation, has stated that in relation to the right to liberty, “arbitrariness” must not be equated simply to “against the law”, but that it should be interpreted more broadly, to include notions of inappropriateness, injustice and lack of predictability.⁵⁴ The *Washington Post* has suggested that “there has to be some principle that guides these decisions – other than what move best serves the government’s interests at any given moment. Otherwise the law becomes a mere instrument of arbitrary state power”.⁵⁵

On 30 January 2003, UK national Richard Reid was sentenced to life imprisonment in US District Court for attempting to detonate explosives on an American Airlines flight from Paris to Miami in December 2001. Sentencing him, the judge told the defendant: “There is all too much war talk here... Here in this court, where we deal with individuals as individuals, and care for individuals as individuals, as human beings we reach out for justice, you are not an enemy combatant. You are a terrorist. You are not a soldier in any war – you are a terrorist... Because we all know that the way we treat you, Mr Reid, is the measure of our own liberties.” Judge William Young reiterated in conclusion that “all this war talk is way out of line”.

Former US Assistant Secretary of State for human rights under the last administration, Harold Koh, has said: “We undermine our own credibility with the rest of the world when we commit human rights abuses at home in the name of fighting a war against terrorism.” By resorting to practices the USA has previously criticized in other countries, he says, “we encourage other countries to commit similar abuses in the name of fighting terrorism, and undermine our own ability to protest when they do”.⁵⁶

The question of torture and ill-treatment

Notorious human rights abusers, including, among others, Burma, Cuba, North Korea, Iran, and Zimbabwe, have long sought to shield their abuses from the eyes of the world by staging elaborate deceptions and denying access to international human rights monitors.

President George W. Bush, 26 June 2003.⁵⁷

Since the attacks of 11 September 2001, there has been concern that the aggressive response of the US Government might include resort to the torture or ill-treatment of suspects taken into custody in the context of the “war on terror”. This concern has been heightened by the denial of access to international human rights organizations to the hundreds of detainees held in Guantánamo Bay, Afghanistan and elsewhere, notwithstanding the access granted to the International Committee of the Red Cross,⁵⁸ and by comments such as that made by the former chief of the Central Intelligence Agency’s Counterterrorist Center, Cofer Black, who told members of Congress in September 2002 that while “operational flexibility” was “a highly classified area”, he would confirm that “there was before 9/11 and after 9/11” and that “after 9/11 the gloves come off”.⁵⁹

The USA has variously used hooding, blindfolding, handcuffing, and shackling of detainees in Iraq, Afghanistan, and Guantánamo. Ill-treatment of detainees reported to Amnesty International delegates in Iraq include prolonged sleep deprivation, prolonged restraint in painful positions, sometimes combined with exposure to loud music, prolonged hooding, and exposure to bright lights. The organization has reported on this separately.⁶⁰

A man interviewed by Amnesty International in Kandahar province in Afghanistan recalled how he was one of 34 members of the Afghan army taken into custody by US forces on 17 March 2002. Abdullah stated that the men’s hands were tied behind their back with plastic zip ties, and that they were taken to the US base in Kandahar. There, he said, they were lined up and ordered to lie down on the gravel, where they lay for several hours. He said that during this time, he was kicked in his ribs. He said that all the men had hoods placed over their heads and were searched by dogs; the men were shaved of all their facial and body hair. Abdullah said that he was shaved by a woman. He alleged that during interrogation, he was handcuffed, his feet were tied together, and a hood was placed over his head.

In an interview on 30 July 2003, Afghan national Alif Khan told Amnesty International that he was held in US custody in Bagram Air Base for five days in May 2002. He said that he was held in handcuffs, waist chains, and leg shackles for the whole time, subjected to sleep deprivation, denied water for prayer and ablution, and interrogated once or twice a day. He was kept in a cage-like structure with eight people, and no speaking was allowed between the detainees. Alif Khan said that he was then transferred to Kandahar Air Base where he was held for 25 days. Again he was held in handcuffs, shackles and waist chains, for most of the time. Although he was allowed to sleep, he said that there were many interruptions, including for interrogations twice or three times every day, and by the constant noise of aircraft. He added that he was subjected to daily intimate body searches, in what he described to Amnesty International as being “searched from both sides”. Another former Bagram detainee, Sayed

Abbasin, has told Amnesty International that he was made to kneel for hours and also subjected to sleep deprivation and prolonged shackling. Others have made similar allegations.

In December 2002 the *Washington Post*, citing interviews with “several former intelligence officials and 10 current US national security officials – including several people who witnessed the handling of prisoners”, alleged that detainees in Bagram had been subjected to “stress and duress” techniques during CIA interrogation.⁶¹ US military officials in Afghanistan have since been quoted confirming the use of these techniques, and former prisoners have also alleged their use. The techniques alleged include prolonged standing or kneeling, hooding, blindfolding with spray-painted goggles, being kept in painful or awkward positions, sleep deprivation, and 24-hour lighting. The deaths in Bagram of two detainees in circumstances suggesting that they may have been beaten (see below), the incommunicado detention of numerous detainees in undisclosed locations, and reports that the US has transferred some detainees to countries known to practice torture, have fuelled the concerns.

The US authorities have consistently stressed that the detainees in their custody are being treated humanely – placing particular emphasis on the provision of appropriate food and medical care. US officials have also given assurances that detainees will be treated humanely during interrogations. In June 2002, for example, Colonel Donald Woolfolk, the Deputy Commander of the Joint Task Force 170 at Guantánamo Bay, gave a written assurance that the USA “does not employ any corporal means of coercion to gain information from persons being interrogated. Rather, the United States has adopted a humane approach to interrogation that relies upon creating an atmosphere of dependency and trust between detainees and the intelligence gathering staff assigned to that detainee.”⁶² In March 2003, the White House spokesman said that: “The standard for any type of interrogation of somebody in American custody is to be humane and to follow all international laws and accords dealing with this type of subject. That is precisely what has been happening, and exactly what will happen”.⁶³

In a letter to Senator Patrick Leahy on 25 June 2003, Pentagon General Counsel William Haynes wrote that government policy was to “comply with all of its legal obligations in its treatment of detainees, and in particular with legal obligations prohibiting torture”.⁶⁴ He added that detainees would be treated and interrogated in a manner that is “consistent with” the constitutional prohibition on cruel and unusual punishment, and that “credible allegations of illegal conduct by US personnel will be investigated and, as appropriate, reported to proper authorities”. Finally, he wrote that the USA would not transfer anyone to a country where they may face torture, and if necessary would seek assurances from the receiving country that torture would not be used against the transferred individual. He added that the USA would “take steps to investigate credible allegations of torture and take appropriate action if there were reason to believe that those assurances were not being honoured”.

Amnesty International has welcomed the Pentagon’s assurances. However, the organization’s concerns about the past, present and future treatment of detainees in the “war on terror” have not been assuaged. For example, does the US administration consider the allegations made to Amnesty International and others, for example, in the *Washington Post* in December, to have been unfounded? If not, what investigations have been conducted and with what results? What specific measures is the government taking to ensure that all its agents comply with

national and international law and standards for the humane treatment of detainees? How thorough and impartial are the investigations into allegations of ill-treatment? More broadly, are there specific interrogation techniques or conditions of detention that the US Government considers to be acceptable that would be contrary to the international prohibition on cruel, inhuman or degrading treatment or punishment?

This latter question is relevant because of the USA's approach to Article 16 of the UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment ("Convention against Torture") which requires governments to "undertake to prevent in any territory under its jurisdiction other acts of cruel, inhuman or degrading treatment or punishment which do not amount to torture". When the USA ratified the Convention in 1994, it lodged a reservation to Article 16 to the effect that it agreed to be bound by the prohibition on cruel, inhuman or degrading treatment only to the extent that this term matched the constitutional ban on "cruel and unusual" punishments. In effect, the reservation can severely limit US obligations under the Convention, and could apply to any US laws or practices which may breach international standards for humane treatment but are allowed under the US Constitution. The US entered an identical reservation to Article 7 of the International Covenant on Civil and Political Rights (ICCPR), which the Human Rights Committee, the body established by the ICCPR to oversee its implementation, has stated is "contrary to the object and purpose of the treaty" and which it has urged the US to withdraw.⁶⁵ In 2000, the Committee against Torture, similarly established to oversee implementation of the Convention against Torture, said that the US reservation violated that treaty and had the effect of limiting its application. It called on the USA to withdraw it.⁶⁶ The Pentagon's letter of 25 June 2003 not only makes no reference to the Committee's position, but underlines the US position that its Constitution will take precedence over international law.

This is important because the USA has shown a tendency to condone some treatment of prisoners that diverges from what is widely considered acceptable among the international community of states.⁶⁷ For example, some 70,000 prisoners in the USA are held in super-maximum security facilities in conditions – solitary confinement and reduced sensory stimulation – which the UN Committee against Torture, has referred to as "excessively harsh".⁶⁸ The USA has not acted upon the Committee's finding in this regard.⁶⁹

In the current context, Amnesty International considers that the totality of the conditions in which most of the Guantánamo detainees have been held, including the indefinite, prolonged and isolating nature of the detentions, can amount to cruel, inhuman and degrading treatment. Prolonged incommunicado detention, an abuse to which detainees held in Bagram Air Base and at undisclosed locations have been subjected, not only facilitates torture but can also itself constitute a form of cruel treatment. The Committee against Torture has expressly held that restraining detainees in very painful positions, hooding, threats, and prolonged sleep deprivation are methods of interrogation which violate the prohibition on torture and cruel, inhuman or degrading treatment.⁷⁰

There appear to be differing views within the US Government as to what constitutes torture or ill-treatment. In a meeting with the Danish Section of Amnesty International on 11 March 2003, for example, the US Ambassador at Large for War Crimes Issues, Pierre-Richard

Prosper, expressed his doubts that sleep deprivation could be categorized as torture. Yet the State Department's entries on Pakistan, Saudi Arabia, Libya, Jordan and Turkey in its latest human rights report, for example, list sleep deprivation among the torture methods used. Now the US is alleged to have used sleep deprivation against "war on terror" detainees.

Even if the "stress and duress" techniques alleged to have been used in Bagram and elsewhere would be prohibited under existing US case law, and even if the detainees are protected by a policy to treat them in a manner that is consistent with constitutional definitions of "cruel and unusual", as the Pentagon's letter of 25 June states, it should be remembered that none of the detainees in Guantánamo, Afghanistan or held at undisclosed locations, has access to any US court to be able to challenge the circumstances of their arrest, the conditions of their detention or their treatment during interrogation. The one US national who has had access to the courts and alleged ill-treatment by US agents during his capture in and transfer from Afghanistan has since withdrawn those allegations as part of a plea arrangement made with the government. John Walker Lindh alleged that he was subjected to cruel use of shackling and handcuffing, blindfolding, and that he was bound naked to a stretcher in a shipping container without light or heat for two or three days.⁷¹ He alleged that he was threatened with death and torture. Under his plea agreement, he "puts to rest his claims of mistreatment by the United States military, and all claims of mistreatment are withdrawn."⁷²

The detainees held in Guantánamo, Bagram and elsewhere are at the mercy of the executive, or rather the executive's interpretation of what protections the Constitution demands and the USA's international obligations require. President Bush recently asserted that the USA is "committed to the worldwide elimination of torture" and is "leading this fight by example".⁷³ Yet, under the Military Order he signed in November 2001 providing for trial by military commission and indefinite detention without trial, any foreign national named under the Order is explicitly "not privileged to seek any remedy or maintain any proceeding, directly or indirectly, or to have any such remedy or proceeding brought on the individual's behalf, in (i) any court of the United States or any State thereof, (ii) any court of any foreign nation, or (iii) any international tribunal".⁷⁴ In other words there will be no judicial redress for any detainee named under the Military Order who may have been abused on arrest or during detention.

One practice that facilitates torture is incommunicado detention, as has been recognized by the Human Rights Committee,⁷⁵ the UN Commission on Human Rights,⁷⁶ the UN Special Rapporteur on Torture,⁷⁷ and the Inter-American Commission on Human Rights.⁷⁸ In its most recent report on human rights in Libya, the US State Department noted that "reports of torture were difficult to corroborate because many prisoners were held incommunicado". Its entry on Egypt notes that "incommunicado detention is authorized for prolonged periods and frequently accompanied allegations of torture". Detainees undergoing interrogation in Bagram Air Base are alleged to have been held in prolonged incommunicado detention and subjected to cruel treatment. Other detainees held in undisclosed locations have been denied access to the outside world. The USA cannot claim to be leading the struggle against torture by example, when the example it is setting is one of using prolonged incommunicado detention. Transparency, access and accountability are the most effective measures against torture and ill-treatment. The US should employ these measures and truly lead by example.

Bagram – interrogation without adequate protection

It's important for all nations, throughout the world, to treat any prisoners well. And that is something the United States always expects, and the United States always does.

White House Press Secretary, Ari Fleischer, 7 May 2002.⁷⁹

In May 2003, a former Guantánamo detainee who had been sent back to Afghanistan, recalled to Amnesty International the 40 days he had spent in US custody in Bagram Air Base in mid 2002 before his transfer to Cuba. Afghan national Sayed Abbasin said that he had not been hit by anybody, but that he had been forced to stand, sit and kneel. He described how being forced to kneel for four hours a day felt worse than being beaten. He says that a year later he still has knee problems. He described a regime of sleep deprivation – 24-hour lighting and guards banging on cells and shouting to keep detainees awake. As noted above, in July 2003 former Guantánamo detainee Alif Khan made similar allegations to Amnesty International about his treatment in Bagram and Kandahar bases. A local human rights worker alleged in March 2003 that 20 former Afghan detainees had said that they were forced to strip and made to sit and kneel naked in awkward positions for hours during questioning in Bagram.⁸⁰ In an interview with Amnesty International on 29 July 2003 in Kabul, Taj Mohammad recalled what his brother Wazir, now in Guantánamo, had written a year earlier in a letter sent from the Bagram detention facility via the International Committee of the Red Cross (ICRC): “Here is no human rights. We are suffering, our condition is too bad”.⁸¹

The Bagram facility apparently holds no more than 100 detainees at any one time.⁸² Prior to their transfer to Cuba, many of the detainees now in Guantánamo were held in Bagram or Kandahar bases (the detention facility at the latter has since been closed), and there too they were denied access to lawyers, families, or the courts. It has been alleged that even the ICRC has not had access to all Bagram detainees, including to those held for up to two weeks.⁸³ Detainees in Bagram – reportedly referred to by the US as “people under control” rather than detainees – are alleged to have been subjected to prolonged standing or kneeling, hooding, blindfolding with blacked-out goggles, being kept in painful or awkward positions, sleep deprivation, and 24-hour lighting.⁸⁴

Two detainees died at Bagram Air Base in December 2002 in suspicious circumstances. It is reported that neither had been seen by the ICRC. In March 2003, US military officials were reported to have confirmed that autopsy reports in the cases of Dilawar, a 22-year-old Afghan man, and Mullah Habibullah, aged about 30, gave cause of death as “homicide” and that “blunt force injuries” were found in both cases. By late June 2003, the Pentagon’s investigation into the deaths was “still in progress”,⁸⁵ and was believed to be ongoing in early August. Amnesty International awaits the full publication of the results of the investigation. Earlier events in Afghanistan left the organization unpersuaded that the US Government was serious about conducting thorough and impartial investigations into allegations of ill-treatment committed by its agents.⁸⁶ Amnesty International expects the USA to now apply the stringent standards of investigation to the deaths in Bagram that it expects of other countries.⁸⁷ The organization has also called for an investigation into the death in custody of another Afghan man in a US holding facility in Asadabad, Kunar province, around 22 June 2003.⁸⁸

Two former detainees reportedly held in Bagram base at the same time as at least one of the prisoners who died there have alleged that they and others were made to stand naked, hooded and shackled, and were kept standing for hours at a time. One of them said that he had spent 16 days in the interrogation section of the facility, standing for 10 of them until his legs became so swollen that the shackles cut into his ankles, severely restricting the blood flow.⁸⁹ He and others said that they were kicked and shouted at by US guards to keep them awake while standing or during interrogation.⁹⁰ Other detainees have made similar allegations, including being subjected to humiliating taunts and verbal abuse by women soldiers.

Colonel Roger King, the chief US military spokesman in Bagram, confirmed that “we do force people to stand for an extended period of time... Disruption of sleep has been reported as an effective way of reducing people’s inhibition about talking or their resistance to questioning.” He was reported as saying that a “common technique” was to maintain 24-hour illumination in cells or to wake inmates up every 15 minutes to disorient them. Forced standing, he said, could also be used to punish any inmate who spoke to another.⁹¹ Lt. Gen. Daniel K. McNeill, Commander of Joint Task Force 180 in Afghanistan, also acknowledged that prisoners had been subjected to forced prolonged standing in Bagram.⁹²

In its entries on Pakistan, Saudi Arabia, Libya, Turkey, and Egypt, in its latest human rights report, the US State Department variously lists the following methods among under torture and other cruel, inhuman or degrading treatment: prolonged isolation, sleep deprivation, the forced spreading of the legs with bar fetters, detainees being “forced constantly to lie on hard floors”, forced prolonged standing, and detainees being stripped and blindfolded and doused with cold water. However, at least one detainee released from Bagram has alleged that he was ordered to strip and then had a bucket of ice-cold water thrown over him. The detainee told Associated Press that “I couldn’t say anything. I was so frightened. I didn’t know what they would do next”.⁹³

On 18 April 2003, Amnesty International’s request to visit detainees held in Bagram Air Base in Afghanistan was rejected in a letter from the Pentagon. The letter explained that “access to detainees is provided to the International Committee of the Red Cross, and on a case-by-case basis to selected government officials”. The letter asserted that the detainees “continue to be treated humanely”.⁹⁴ A request made by an Amnesty International researcher in Kabul in late July 2003 to be allowed to meet officials in Bagram Air Base remained unanswered.

Amnesty International has called for a full, impartial inquiry into the treatment of detainees in Bagram Air Base and for the findings to be made public. The organization has received information indicating that conditions in the facility have recently improved. Even if this were the case, it would not absolve the authorities from investigating any past abuses that may have occurred and from bringing to justice anyone responsible for torture or ill-treatment. In addition, no statements extracted under torture or ill-treatment should be used as evidence in any proceedings, except in prosecuting the alleged torturer. Anyone who is found to have been tortured or ill-treated should have access to full reparation, including fair and adequate compensation and rehabilitation. If anyone is found to have died as a result of torture, his or her dependants would be entitled to compensation.⁹⁵

Guantánamo – a regime cruel in its totality

We have made it clear to the Americans that many aspects of what has gone on at Guantánamo are not acceptable. We shall continue to do so.

United Kingdom government minister, Chris Mullin⁹⁶

More than 650 people remain held without charge or trial in the US Naval Base in Guantánamo Bay in Cuba. They are from around 40 countries, and reportedly include nationals of Afghanistan, Algeria, Australia, Azerbaijan, Bahrain, Belgium, Canada, China, Denmark, Egypt, France, Iran, Iraq, Jordan, Kazakhstan, Kuwait, Libya, Maldives, Mauritania, Morocco, Pakistan, Qatar, Russia, Saudi Arabia, Spain, Sweden, Turkey, Uganda, United Kingdom, Uzbekistan and Yemen. Many of the detainees have been held in the base for well over a year. None has had access to any court, to a lawyer, or to family members. The military has not made public the precise numbers, identities or nationalities of the prisoners. Sporadic transfers to, and releases from, the base continue. On 18 July 2003, for example, the Pentagon announced the release of 27 detainees, believed to be 16 Afghan nationals and 11 Pakistan nationals, and the arrival of approximately 10 new inmates.⁹⁷

Above the main gate of the Naval Base detention facility is a large sign bearing the slogan of Joint Task Force Guantánamo, the military unit which is “responsible for the detention and interrogation of enemy combatants apprehended by [the Department of Defence] and other US government agencies as a result of the ongoing Global War on Terrorism.”⁹⁸ The slogan reads: “Honor Bound to Defend Freedom”. Amnesty International believes, however, that in the name of “freedom” and national security, international standards are being undermined in this detention camp. Criticism of the administration’s policy is widespread. *The Economist*, for example, has called for the facility to be dismantled. It has said that the treatment of the detainees is “unworthy of a nation which has cherished the rule of law since its very birth, and represents a more extreme approach than it has taken even during periods of all-out war. It has alienated many other governments at a time when the effort to defeat terrorism requires more international co-operation in law enforcement than ever before.”⁹⁹

Many of the Guantánamo detainees were taken into custody in the context of the international armed conflict in Afghanistan. None of these detainees has been granted prisoner of war status or brought before a “competent tribunal” to determine his status, as required by Article 5 of the Third Geneva Convention. The US government has insisted that tribunals only need be convened in the event of doubt, and that it has no doubt about the non-POW status of the detainees. The UN Working Group on Arbitrary Detention has noted that “the authority which is competent to determine prisoner-of-war status is not the executive power, but the judicial power.”¹⁰⁰ The International Committee of the Red Cross has “repeatedly urged” the US to clarify “the legal status of each internee...on an individual basis”.¹⁰¹ Its exhortations have not been acted upon.

Common Article 3 of the Geneva Conventions requires that anyone taken into detention in the context of an armed conflict “shall in all circumstances be treated humanely”. Among other things, this Article prohibits “outrages upon personal dignity, in particular, humiliating and

degrading treatment”. This protection is also contained in Article 75 of the first Additional Protocol to the Geneva Conventions, which reflects customary international law.

The first prisoners, transferred in groups of around 30 from Afghanistan on 20-hour flights in conditions of sensory deprivation and heavy use of restraints, arrived in Guantánamo Bay on 11 January 2002. The Pentagon released a photograph of detainees in orange jumpsuits, kneeling before US soldiers, shackled, handcuffed, and wearing blacked-out goggles over their eyes and masks over their mouths and noses, causing substantial international concern.¹⁰² Released prisoner Sayed Abbasin has recalled: “I arrived tied and gagged; it was the act of an animal to treat a human being like that. It was the worst day of my life”.¹⁰³ He said that he had not been told why he was being transferred or where he was being taken to, in violation of Article 75(3) of the first Additional Protocol, which states that “any person arrested, detained or interned for actions related to the armed conflict shall be informed promptly, in a language he understands, of the reasons why these measures have been taken.”

Another former Guantánamo detainee, Muhammad Naim Farooq, in an interview for Amnesty International in Zurmat, Afghanistan, on 5 August 2003, also said that he had not been told where he was being taken, or why, when he was transferred to Cuba in mid-2002. He said: “We didn’t know where we were going. We were without hope because we were innocent. I was very sad because I could not see my children, family and friends. But what could we do? Yes, we got enough food – but what does this mean? My mother lost her eyesight while I was there”.

Muhammad Naim Farooq recalled that the tightness of his handcuffs during the transfer injured his wrists, and that many of his co-detainees were crying “because of pain” or because they were “getting mad”. Fellow Afghan national and released Guantánamo detainee Alif Khan told Amnesty International in an interview in Kabul in July 2003 that he had been given two injections, one in each arm, for his transfer to Cuba in June 2002. He said that he did not know what they were, but referred to experiencing “a kind of unconsciousness”.

For the first three and a half months, the Guantánamo detainees were held in the small wire-mesh cages of Camp X-Ray. Together with the conditions of transfer, this caging called into question not only the USA’s respect for Common Article 3, but also its adherence to Article 10 of the International Covenant on Civil and Political Rights, which states that “all persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person”. The Human Rights Committee has stated in its authoritative interpretation of Article 10: “Treating all persons deprived of their liberty with humanity and with respect for their dignity is a fundamental and universally applicable rule... This rule must be applied without distinction of any kind”.¹⁰⁴ The detainees’ treatment would appear to give the lie to the USA’s assertion that it “will champion the cause of human dignity and oppose those who resist it”.¹⁰⁵

A newly-built more permanent prison, Camp Delta, replaced Camp X-Ray from 28 April 2002. A medium-security facility inside Camp Delta, Camp 4, with a capacity of around 160 and a less harsh regime, became fully operational on 2 April 2003. In this facility, for example, the prisoners live communally, wear white clothes rather than the orange jumpsuits,

and have more exercise time and other benefits. Camp 4, which the military admits differs “substantially” from the rest of Camp Delta, is where prisoners have been held for up to several months in preparation for their release. According to the military, this facility is for those detainees “who are considered less of a security risk to guards and other detainees, and who have been cooperative in the interrogation process.”¹⁰⁶ The latter could suggest that even the US authorities consider the conditions in Camps 1 to 3 to be potentially coercive. Another facility, Camp Iguana, has been established for child detainees.

Most of the detainees, however, remain held in the maximum-security blocks of Camp Delta which have a capacity of over 800. The cells of Camp Delta are even smaller than was the case in Camp X-Ray. Camp Delta’s cells measure six feet eight inches by eight feet (2.03 metres by 2.44 metres), compared to the eight feet by eight feet of Camp X-Ray’s cells.¹⁰⁷ Detainees are held in these small cells for up to 24 hours a day.¹⁰⁸ One of the aspects of their treatment that has caused particular international disquiet is their lack of out-of-cell exercise time. The UK Government, for one, has said that it has pressed for adequate exercise for the detainees.¹⁰⁹ For many months, the detainees were given as little as 15 minutes of exercise time once or twice a week. According to the military, this has recently been upgraded to 30 minutes from three to seven times per week in wire-fenced concrete areas of about 25 feet by 30 feet.¹¹⁰ This would still fall short of international standards. Article 38 of the Third Geneva Convention and Article 94 of the Fourth Geneva Convention provide, respectively, for prisoners of war and interned civilians to be afforded adequate outdoor exercise. Under the Third and Fourth Geneva Conventions, even detainees under disciplinary proceedings must have access to at least two hours outdoor exercise every day.¹¹¹ International human rights standards require that all prisoners have “at least one hour of suitable exercise in the open air daily if the weather permits”.¹¹²

The detainees’ right to be presumed innocent, and treated as such, unless and until they are convicted in a fair trial, has been flouted by an administration which has repeatedly labelled them as “terrorists”. Vice President Dick Cheney, for example, has characterized the detainees as “the worst of a very bad lot. They are very dangerous. They are devoted to killing millions of Americans.”¹¹³ The detainees have been denied legal counsel despite being thus labelled and even though the repeated hours-long interrogations to which they have been subjected have had possible prosecutorial, as well as intelligence-gathering, implications, as US officials have stated on various occasions.¹¹⁴ Secretary of Defence Rumsfeld recently said that one of the reasons the processing of the prisoners was taking so long was because “some of the agencies are focusing on law enforcement. What have these people done wrong that might lead to a law enforcement action in our country or another country?”¹¹⁵

Those interrogated include children and the elderly. Amnesty International has expressed concern about the well-being of Haji Naim Kuchai, a 65-year-old Afghan elder transferred to Guantánamo Bay in March 2003 after having been held at an undisclosed location for the previous three months. He is diabetic and had to wear a surgical belt following the removal of one of his kidneys.¹¹⁶ An Afghan man released in October 2002, said to be in his 70s, recalled hours-long interrogations in Guantánamo Bay.¹¹⁷ Another released prisoner told Amnesty International in May 2003 that the interrogations were “like torture”.

As with the other detainees, Afghan national Muhammad Naim Farooq had been repeatedly interrogated in US custody in Afghanistan prior to his transfer to Guantánamo Bay. In his interview for Amnesty International in August 2003, he said that he was interrogated immediately after his arrival in Guantánamo Bay, but that he was not questioned again for another three months. He was then interrogated monthly, for between 30 minutes and three hours. After several months he was told that his interrogations were over. However, he was still not released for another three months.

Muhammad Naim Farooq had been transferred to Guantánamo from Kandahar Air Base in Afghanistan in mid-2002. Before his transfer he said that he was told that he would soon be released. He said that he had been told the same thing when he was transferred to Kandahar, bound and blindfolded, from Bagram Air Base where he had spent a month after his arrest. In the event, he was held in Kandahar for four months and in Guantánamo for close to a year. Muhammad Naim Farooq suggested that the authorities should not tell prisoners that they will be released and then hold them for months longer. He said that many detainees “lost their nerves” because of this.

Amnesty International considers that the totality of the Guantánamo regime – including the prolonged and indefinite nature of the detentions – can amount to cruel, inhuman or degrading treatment. The organization recalls what the Deputy Commander of Camp X-Ray said, more than a year ago: “Consider yourself being locked up 24 hours a day; getting out once in a while – very, very little getting out. Not knowing what’s going to happen, probably not even knowing why you’re here. I think it would frighten anybody”.¹¹⁸ Despite the opening of the medium security facility for pre-release inmates and a few dozen releases, little has changed.

In the context of the interrogations, the possibility of trials by military commission with lower standards of evidence than apply in normal US courts, raises concern about the potentially coercive nature of the conditions. Principle 21 of the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment states: “It shall be prohibited to take undue advantage of the situation of a detained or imprisoned person for the purpose of compelling him to confess, to incriminate himself otherwise or to testify against any other person”. Agreements to plead guilty, too, could possibly be coerced by this treatment. The rules for the military commissions under the November 2001 Military Order, provide that plea arrangements have to be approved by the Secretary of Defence, or his designee, the authority ultimately responsible for the conditions under which the detainees are being held.¹¹⁹ Such officials are evidently fully supportive of the detention regime in Guantánamo Bay.

Media interviews with prisoners released from Guantánamo in April and May 2003 generally painted a picture of minimal direct physical ill-treatment, but some returnees spoke of humiliation and a regime quick to punish. Most were interviewed following their return to Afghanistan in conditions, including continuing incarceration in Kabul, where they were not necessarily free to speak openly without fear of negative repercussions. Amnesty International delegates in Afghanistan noted that some of the returnees at this time appeared highly disoriented and distrustful. The *New York Times* noted that “many prisoners were careful not to criticise the American authorities, showing a continued nervousness about their status in Afghanistan”. One of them had said that it was “too early to speak of conditions” in

Guantánamo. Another man who had spent 10 months there said that “there were three degrees of treatment: good, bad and the worst”, without further reported elaboration.¹²⁰

One of the released Afghan men, Mohammad Taher, told Amnesty International in May 2003, that he had suffered mentally from his detention and that he was having difficulty remembering things. He had spent two and a half months in Kandahar Air Base before being transferred to Guantánamo, where he thought he had been held for between eight to 10 months. A Pakistani national, Mohammed Sagheer, was reported to be preparing to sue the US Government for the mental harm done to him during his 10 months in Guantánamo.¹²¹ Sayed Abbasin, who had spent about a year in Camp Delta, told Amnesty International that, for him, sleep deprivation was a result of the regime there, because of the 24-hour illumination and because the military guards would not allow him to cover his head with a blanket to make sleep easier.¹²² He reports that he has had problems with his eyesight since returning. This former prisoner, who described the detention facility as “like a zoo” rather than a prison, also alleged that he was put in a punishment cell for five days as punishment for exercising in his cell. He has said that while in this cell, which he has said had no blankets,¹²³ he was not allowed his outdoor “exercise” time and was not allowed to wear his cap during prayer. Mohammad Taher told Amnesty International that while he himself was never taken to a punishment cell, others were taken there for 20 days, for example for refusing food. He said he believed that the punishment cells had worse conditions. These isolation cells are reportedly the same size as the others but with solid walls and doors and a small window.¹²⁴

The legal black hole that is Camp Delta has gained such notoriety that US and other authorities have reportedly used it as a threat during interrogation, including US soldiers in Iraq.¹²⁵ Amnesty International has been told by relatives of detainees in Yemen, for example, that as the problem of arbitrary detentions increased in the context of Yemen-US security co-operation following 11 September 2001, the Yemeni security police began frequently to threaten detainees that they would be handed over to US agents to take them to Guantánamo. An Afghan prisoner released from the US Air Base in Bagram, where he was reportedly held for 18 days in what he described as a regime of 24-hour illumination and sleep deprivation, also alleged that he was threatened with transfer to Guantánamo to try to force cooperation during interrogation.¹²⁶ Another released Afghan prisoner said that during interrogation he was threatened with transfer to Guantánamo. He said: “One of them brought me 50 small stones and said ‘count these stones’. When I finished he said, ‘We will send you there for 50 years’.”¹²⁷ He was not transferred to Cuba.

By 16 July 2003, there had been at least 29 suicide attempts by 18 individuals held in the Guantánamo Bay detention facility. One detainee is reported to have been left brain damaged by his attempt to hang himself, and remained in the prison hospital months later. He was said to be in a “persistent vegetative state”, and to require round-the-clock care.¹²⁸ In his interview for Amnesty International in August 2003, former detainee Muhammad Naim Farooq recalled that he had “personally seen two cases, one Afghan and one Iranian. They tried to hang themselves with clothes. Both survived and were punished with solitary confinement, without any clothes. I could not see for how long”.

Recent suicide attempts were made on 2 June and 16 July 2003 by inmates who were undergoing treatment for mental health problems,¹²⁹ emphasising that the potential psychological and physical effects of the continuing detentions in Guantánamo remain a cause for concern. On 7 February 2003, Amnesty International wrote to the US Government to urge a full investigation into the suicide bids in an effort to evaluate what role the conditions of incarceration have played in them, with a view to taking all necessary remedial measures. No reply has been received.

In July 2003, the head of the delegation of the International Committee of the Red Cross (ICRC) in Guantánamo Bay confirmed that the uncertainty of a “seemingly open-ended detention”, “without any clear legal framework”, has had an “overall impact on the mental health of the prisoners”.¹³⁰ Another ICRC spokesperson has said: “The uncertainty these detainees face as regards their legal status and their future does have a very adverse impact on their physical and mental well-being. A lot of them are pushed to despair. It is a clear indication that these people are under extreme stress and anxiety.”¹³¹

Reports of interviews with released prisoners add further evidence that it is the indefinite nature of the detentions, a growing sense of injustice among the detainees, and the isolating conditions of their incarceration which have led to inmate despair. Shah Muhammad, a 20-year-old Pakistani man who spent more than a year in Guantánamo, recalled how he had attempted suicide more than once: “I tried four times, because I was disgusted with my life. It is against Islam to commit suicide, but it was very difficult to live there. A lot of people did it. They treated me as guilty, but I was innocent.” He said that for several months he was held in a block with prisoners who only spoke Arabic, a language he could not speak: “It was difficult not speaking to anyone for so long... they were only letting us out for a very short time, and it was very difficult. I could feel myself going down”. Another former prisoner, Suleiman Shah, recalled that: “All the people were worried about how long we would be there for. People were becoming mad because they were saying, ‘when will they release us? They should take us to the high court’. Many stopped eating.”¹³²

At home, meanwhile, the families of the detainees suffer the distress of not knowing the fate of their loved ones. Arbitrary or indefinite detention, too, has its “collateral damage”. Muhammad Naim Farooq recalled the case of Juma Khan, from Jalalabad, whose family members thought he was dead until Muhammad Naim Farooq, himself released, could tell them that he was being held in Guantánamo Bay.

Wazir Mohammad has been in Guantánamo for over a year. His wife is said to be suffering serious emotional and psychological distress. The couple now have a one-year-old son, their first child, whom Wazir Mohammad has never seen. The same has happened in other cases. Since Maldives national Ibrahim Fauzee has been in Guantánamo, his wife has given birth to their first child, a girl. Likewise, Mustafa Ait Idir, an Algerian national held in the Naval Base for more than 18 months, has a child he has never seen. The US authorities have denied all detainees in Guantánamo the right to visits from their family, in contravention of international standards.¹³³ Amnesty International considers that the absolute prohibition of visits by families to detainees is inconsistent with the rights of detainees’ children to maintain contact with their detained parents.¹³⁴

Children among the detainees

Despite their age, these are very, very dangerous people. They may be juveniles, but they're not on a little-league team., they're on a major league team, and it's a terrorist team.

General Richard B. Myers, Chairman of the Joint Chiefs of Staff, 25 April 2003.

Article VII of the American Declaration of the Rights and Duties of Man holds that “all children have the right to special protection, care and aid.” The Declaration is binding on the USA, as a member of the Organization of American States. Article 23 of the International Covenant on Civil and Political Rights states that the family “is entitled to protection by society and the State”, and Article 24 states that all children shall be provided appropriate protection, according to their status as a minor, and free from any discrimination, including on the basis of nationality.

In April 2003 the US authorities revealed that children as young as 13 were among the foreign nationals held at Guantánamo. A released prisoner told Amnesty International in May 2003 that he recalled speaking to a 12-year-old boy detainee in Guantánamo. One child, Canadian national Omar Khadr, was already known to have been in US custody for almost a year, half of it in Guantánamo Bay, where he was transferred in October 2002. He was reported to have been 15 years old when he was captured in Afghanistan in July 2002. He, along with the other detainees, has been denied access to lawyers or relatives.¹³⁵ Likewise, they have had no access to any court or tribunal in which to challenge the lawfulness of their detention or to have their status determined.

Amnesty International wrote to the US Government on 24 April 2003 calling for clarification on how many under-18-year-olds were being held in Guantánamo and for them to be granted immediate access to lawyers, families and to be charged and adjudicated in accordance with internationally-agreed principles of juvenile justice, or released. The organization pointed out that the definition of “child” according to most international legal standards is anyone under the age of 18. Amnesty International had received information that as early as May 2002, there was at least one 17-year-old being held in Camp Delta.

However, the Pentagon appears to define child detainees in this context as those who are under 16 years old. In a response to Amnesty International's letter, it stated that “there are a very small number of the detainees whom we have assessed to be under the age of 16. It is difficult to determine the exact age for the detainees, as birth records are not readily available”.¹³⁶ It ignored the question of 16 and 17-year-olds. For his part, the Secretary of Defence responded to the widespread concern about these young detainees by complaining of “this constant refrain of ‘the juveniles’, as though there's a hundred children in there – these are not children”.¹³⁷ The Chairman of the Joint Chiefs of Staff suggested that “despite their age, these are very, very dangerous people... they may be juveniles, but they're not on a little-league team anywhere, they're on a major league team, and it's a terrorist team.”¹³⁸

The Pentagon has since repeated this disregard for the presumption of innocence in its standard response about under 16-year-olds held in the naval base: “Detainees at Guantánamo are dangerous people. Age does not necessarily diminish the threat potential of any detainee.

Detainees remain in custody for as long as they are considered a threat to innocent men women and children around the world.”¹³⁹ This is the same government which in 2002 told the UN General Assembly Special Session on Children that the USA was “the global leader in child protection”. The United States is also almost the only country left in the world that executes child offenders, accounting for three quarters of such internationally illegal executions known worldwide in the past five years.¹⁴⁰

Amnesty International’s Canadian Section has urged the Canadian authorities to seek assurances from the USA that it will not seek the death penalty against Omar Khadr, who may be suspected of involvement in the shooting death of a US soldier in Afghanistan when he was 15 years old.¹⁴¹ If this was indeed Khadr’s age at the time of the alleged offence, he would not be eligible for the death penalty under US constitutional law (which sets 16 as the minimum age), but as a foreign national held in Guantánamo he could yet fall under the judgment of a military commission and be afforded no such protection. US officials have reportedly refused to rule out the possibility that the death penalty may be sought against Omar Khadr.¹⁴² This would not only violate international human rights and humanitarian law banning the use of the death penalty against anyone for crimes committed when they were under 18,¹⁴³ but also contravene the international prohibition on discrimination on the basis of national origin. No child with US nationality, accused of a similar crime committed when under the age of 16, would be eligible for trial by military commission or the death penalty.

The detention and interrogation of unrepresented children in Guantanamo, as well as contravening international law and standards that apply to both adults and children, violate principles reflecting a broad international consensus that the vulnerabilities of under-18-year-olds require special protection. For example, Article 37 of the Convention on the Rights of the Child (CRC), as well as prohibiting the use of torture or the death penalty against children, states that “the arrest, detention or imprisonment of a child shall be in conformity with the law and shall be used only as a last resort and for the shortest appropriate period of time”. Article 40 of the CRC states that “every child deprived of his or her liberty shall have the right to prompt access to legal and other appropriate assistance, as well as the right to challenge the legality of the deprivation of his or her liberty before a court or other competent, independent and impartial authority, and to a prompt decision on any such action.”

The USA is not one of the 192 countries to have ratified the CRC, although it is a signatory and therefore obliged not to do anything that would undermine the object and purpose of the treaty pending its decision on whether to ratify it.¹⁴⁴ The USA has ratified the Optional Protocol to the CRC on the involvement of children in armed conflict. According to Article 6(3), if the children in Guantánamo are being held because they participated in the armed conflict in Afghanistan, as the Pentagon has suggested,¹⁴⁵ the USA has a treaty obligation to provide them with “all appropriate assistance for their physical and psychological recovery and their social reintegration”. Detaining children in prolonged military custody in Guantánamo Bay cannot meet this obligation.

The need for judicial review

What kind of justice is that? To keep a young innocent person for 13 months, to pick someone up off the street and jail him without proof, without a proper investigation. Is that the law they have?

Sayed Abassin, former Guantánamo detainee¹⁴⁶

Sayed Abassin spent more than a year in US custody without charge or trial, first in Afghanistan and then in Guantánamo Bay, apparently for the sole reason that on a day in April 2002, he was in the wrong place at the wrong time.

This 28-year-old Afghan taxi driver had been *en route* from Kabul to Khost in April 2002. In Gardez his taxi had been stopped at a checkpoint by men who said that one of his passengers was the cousin of a regional power holder. In May 2003, Sayed Abassin recalled to Amnesty International how he himself had been arrested despite explaining that he was just the driver and did not know his passengers. He was taken to Gardez police station, where he says he was beaten, before being handed over to the custody of the US military. He was briefly questioned and then flown by helicopter to Bagram Air Base. His father made inquiries, but has informed Amnesty International that he was told nothing by the US authorities other than that his son had been taken to Bagram. There Sayed Abassin says he was held in handcuffs and shackles for the first week, kept in 24-hour lighting and woken by guards when trying to sleep, interrogated six or seven times, not given enough food, not allowed to talk to or look at other detainees, and forced to stand or kneel for hours. He also recalled his transfer to the US base in Kandahar – roughly handled, blindfolded, with his ears covered, a black bag over his head and taped around his neck, his hands and legs tied. He said that detainees at Kandahar were not allowed to look at the soldiers faces. If they did look at their face, they were made to kneel for one hour. If they looked twice, they were made to kneel for two hours. He says that he was interrogated five or six times in Kandahar.

During all this time in US custody in Afghanistan, Sayed Abassin had no access to a lawyer, to a court of law, or to a “competent tribunal” as envisaged by the Third Geneva Convention. Perhaps if he had, his release would have been ordered. Instead he was transferred to Guantánamo Bay, where the denial of any legal process continued for the next year. He told Amnesty International that he had been interrogated 10 or more times in the first few weeks after his arrival in Camp Delta, and was then held for another 10 months without any interrogations before being released.

Sayed Abassin was released from Guantánamo Bay in April 2003 and brought back to Afghanistan. He was made to sign an agreement not to have any involvement with the Taliban or *al-Qa’ida* or to do anything that would harm the USA, despite the apparent absence of any evidence that he ever had any such involvement. Acquaintances of Sayed Abassin in Kabul said after his return to Afghanistan: “He’s just a simple taxi driver at the wrong place at the wrong time... Taxi drivers shouldn’t be taken to Guantánamo Bay, they can be questioned here, or through the Afghan government.... You don’t take him prisoner and take him away for a year. He couldn’t support his family and now he needs money. The Americans should compensate him for everything he lost.”¹⁴⁷

The US government maintain that the so-called “enemy combatants” it is holding in Guantánamo Bay and elsewhere are not entitled to have access to court or counsel. It states that “at the time of capture, they were bearing arms against the United States or otherwise acting in support of hostile armed forces [sic] engaged in an ongoing armed conflict”.¹⁴⁸ How did Sayed Abassin fall into this category? How many more like him are in Guantánamo? Sayed Abassin himself states that there is at least one more. His best friend, Wazir Mohammad, also a taxi driver, aged around 30, was arrested in Gardez after he went to the checkpoint to inquire as to Abassin’s whereabouts. He, too, was arrested by the Afghan checkpoint guards, handed over to US custody, and subsequently shipped to Camp Delta, where he remains more than a year later, uncharged, untried, and unrepresented. His brother, Taj Mohammad, maintains that his brother was arbitrarily detained. In July 2003 in Kabul, he told Amnesty International: “My brother is innocent, he didn’t commit any crime. Even if they cut off my head, I will still say that my brother is innocent, because he is innocent”. He asked Amnesty International to: “Please raise my voice to the world”.

In letters Wazir Mohammad has complained of the small size of his cell, the heat, the lack of out of cell exercise time, and problems with his knees. In a letter to his brother, he wrote the following poem, seen by Amnesty International, and here translated as:

*I didn't steal anyone's things and I didn't kill anyone
I have never committed any crime, but I am in sorrow
I went to get a piece of bread on the way to Gardez
I fell down from the mountain on the way to the hill
I'm in a cage like an animal
No-one's asked me am I human or not
I didn't speak ill of people
I didn't commit any crime, but I'm in prison.*

Safeguards are essential. Secrecy must be challenged. The US Government’s refusal to allow any Guantánamo detainee to come before any court or tribunal, in addition to the secrecy surrounding the detentions – the exact numbers, names, nationalities, and circumstances of arrest, have not been made public by the authorities – have set the USA on a slippery slope to promoting a world in which arbitrary unchallengeable detention becomes acceptable. A US federal court recently noted that “there exists a clear and universally recognized norm prohibiting arbitrary arrest and detention. This prohibition is codified in every major comprehensive human rights instrument and is reflected in at least 119 national constitutions.”¹⁴⁹ The US administration’s current actions are undermining this norm.

The need for judicial review of the detentions is made even clearer by the fact that not all of the detainees who have ended up in Guantánamo Bay were taken into custody in the context of the war in Afghanistan. Such individuals include two men transferred to Guantánamo in early 2003 via Bagram from Gambia, and six Algerian men unlawfully seized by the USA in Bosnia-Herzegovina in January 2002 and transferred to Guantánamo Bay (see further below). Perhaps the US authorities suspect them and others held in Camp Delta of serious crimes. In which case they should be charged and brought to trial within a reasonable time, in

accordance with international fair trial standards and without resort to the death penalty. Otherwise they should be released. Those detained as combatants in the context of the international conflict in Afghanistan should be voluntarily repatriated, as required under the Geneva Conventions, unless they are to be charged with criminal offences or would face serious human rights abuses if returned to their country.

As early as March 2002, a deputy commander in the Guantánamo facility said that some of the detainees were “victims of circumstance” and probably innocent.¹⁵⁰ Other reports indicate that one in 10 of the detainees were transferred to Cuba despite having already been deemed to be of no intelligence value.¹⁵¹ The releases that have occurred so far would appear to confirm this. Around 60-70 detainees – believed to be mainly nationals of Afghanistan and Pakistan, with a few Saudi nationals – are believed to have been released from Guantánamo, including a small number who have been transferred to custody elsewhere.¹⁵² Those released include an Afghan man so mentally ill that he was considered of no value to the US authorities. They include the elderly. One Afghan man released in October 2002, said to be in his 70s, recalled being tied up and blindfolded by US forces in Afghanistan, and of hours-long interrogations in Guantánamo Bay. He complained: “I don’t know why the Americans arrested me. It told them I was innocent. I’m just an old man”.¹⁵³ The military insisted that he and the others released with him had posed a threat to US security at the time of their detention.¹⁵⁴ It has provided no evidence to back up this assertion.

In July 2002, the Inter-American Commission on Human Rights (IACHR) reiterated its request that the US Government “take the urgent measures necessary to have the legal status of the detainees at Guantánamo Bay determined by a competent tribunal”, adding that “it is not sufficient for a detaining power to simply assert its view as to the status of a detainee to the exclusion of any proper or effectual procedure for verifying that status”. The US Government ignored this, despite claiming to be a government that is a “very strong” supporter of the IACHR, and one which is looking for “every opportunity to advance human rights and to work with the Commission”.¹⁵⁵

In December 2002, the UN Working Group on Arbitrary Detention noted that where prisoner of war status is not recognized by a competent tribunal, “the situation of detainees would be governed by the relevant provisions of the [International Covenant on Civil and Political Rights] and in particular by articles 9 and 14 thereof, the first of which guarantees that the lawfulness of a detention shall be reviewed by a competent court, and the second of which guarantees the right to a fair trial”.¹⁵⁶ The US Government has rejected this.¹⁵⁷

Article 9(4) of the International Covenant on Civil and Political Rights (ICCPR) states: “Anyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings before a court, in order that that court may decide without delay on the lawfulness of his detention and order his release if the detention is not lawful”. The Human Rights Committee has stressed that this “important guarantee... applies to all persons deprived of their liberty by arrest or detention”.¹⁵⁸ Indeed, it has stated that this right is non-derogable, even in states of emergency.¹⁵⁹ Article 7(6) of the American Convention on Human Rights (ACHR) provides the same right. States are not allowed to suspend this right even in exceptional cases such as a state of emergency.¹⁶⁰ The USA has signed the ACHR, thereby

binding itself under international law not to undermine the object and purpose of the treaty pending a decision on whether to ratify it.¹⁶¹

The Human Rights Committee has stated that even if so-called preventive detention is used for reasons of public security, it must be controlled by the provisions of Article 9 of the ICCPR, and stressed that those who have been arbitrarily arrested have the right to compensation. Article 9(5) requires that “anyone who has been the victim of unlawful arrest or detention shall have an enforceable right to compensation”.

On 27 February 2002, Secretary of Defence Rumsfeld said: “If we find that someone’s an innocent and shouldn’t have been brought here, why, they would be released.”¹⁶² It took more than a year from that statement for 18 Afghan nationals to be released uncharged or untried from Camp Delta and flown back to Afghanistan. They have maintained their innocence and expressed their anger at being held for a year in such circumstances. One of them, Sayed Abbasin, told Amnesty International: “I feel pity for the Geneva Conventions and other conventions. I was held for one year, where were those laws then?” adding “there were no human rights for me in that year”.

In a statement to the UN Commission on Human Rights on 18 March 2003, the President of the International Committee of the Red Cross, Dr Jakob Kellenberger, said: “Human rights law, refugee law and international humanitarian law share the common objective of protecting human life, safety and dignity. These bodies of law and their supervisory mechanisms form an interlocking web of guarantees for individuals in particular in times of emergency – when they are most vulnerable. The development of these bodies of law over the past half century is a remarkable humanitarian achievement. A comprehensive system has been established where no state is above the law and no person falls outside the protection of the law. If correctly and fully applied, international law remains one of the strongest tools the international community has at its disposal to maintain international order and stability and to ensure the safety and dignity of all persons”.

On 27 May 2003, Dr Kellenberger met with the US Secretary of State, the National Security Adviser, the Counsel to the President and the Under-Secretary of Defence for Policy. The ICRC President asked the US authorities “to institute due legal process and to make significant changes for the more than 600 internees” held in Guantánamo Bay.¹⁶³ The US authorities have effectively thrown the Guantánamo detainees and those held elsewhere into a legal black hole. In so doing they have begun to unpick the “interlocking web” of international protections.

In his interview for Amnesty International in Afghanistan in August 2003, former Guantánamo detainee Muhammad Naim Farooq stated his belief that there were many innocent “poor” people held in the naval base. He suggested that the international community should stand up to the USA and end this “injustice”. The brother of current Guantánamo detainee Wazir Mohammad suggested to Amnesty International in July 2003 that the USA’s treatment of the prisoners “makes the reputation of the US bad amongst the people of Afghanistan”. He added: “My message to Mister Bush is that he should take the cases of these people seriously and obtain the release of those who are really innocent”.

Out of the reach of the US courts

The prospect of the Guantánamo captives being detained indefinitely without access to counsel, without formal notice of charges, and without trial is deeply troubling.

US District Court, May 2003

Attempts have been made by lawyers, acting on behalf of relatives of the prisoners, to obtain justice for the Guantánamo detainees in the US courts. Relying on half-century-old US Supreme Court precedent, however, the executive has successfully kept the prisoners out of the reach of the judiciary. A recent attempt to change this failed on 13 May 2003, when a District Court judge ruled that precedent compelled the finding that the detainees did not have the right to challenge their confinement in US federal court.¹⁶⁴ The case had been brought by the brother of Libyan national Falen Gherebi who was transferred to Guantánamo from Afghanistan in January 2002 and remains in Camp Delta. Even the federal judge who ruled in favour of the government described the plight of the detainees as “deeply troubling” and their treatment as “not consistent with some of the most basic values our legal system has long embodied”. Judge Howard Matz expressed the hope that a higher court might find a “principled way” to overcome the precedent and provide the remedy that had eluded him.¹⁶⁵

International law applies to persons subject to the jurisdiction of a state party even abroad. Article 2(1) of the International Covenant on Civil and Political Rights states: “Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind”, including on the basis of national origin. The Human Rights Committee has emphasised that States parties have an obligation to ensure that this applies to “all individuals under their jurisdiction.”¹⁶⁶ The Committee has made it clear that the ICCPR applies to places outside the territory of a state party under its control.¹⁶⁷ Under article 27 of the Vienna Convention on the Law of Treaties, a country “may not invoke the provisions of its internal law as justification for its failure to perform a treaty”.

The US courts have based their decisions in favour of the government and against the Guantánamo detainees on a 1950 US Supreme Court ruling, *Johnson v Eisentrager*. In that decision, involving German nationals tried by military commission for assisting Japanese forces against the USA in 1945, the Supreme Court held that “non-resident enemy aliens”, captured and imprisoned abroad, have no access to, and no right to *habeas corpus* in, any US court. The *Eisentrager* majority emphasised that foreign nationals who, like the prisoners in that case, had not been at any relevant time “within any territory over which the United States is sovereign”, were not protected by the US Constitution. The USA has occupied the Guantánamo Bay Naval Base under a lease agreement made with Cuba in 1903 and modified in 1934. In the case of the current detainees, the courts have rejected the argument that, even if Cuba holds ultimate sovereignty over the Naval Base, the USA holds *de facto* sovereignty over it by exercising complete jurisdiction and control. The federal judge who reluctantly ruled for the government in May 2003, acknowledged that the distinction between *sovereign territory* and *complete jurisdiction and control* may “appear technical (or at least elusive)”, but said that he was unable to disregard the precedent set by the *Eisentrager* case.

In the words of the Court of Appeal in the United Kingdom, asked to consider the detention of UK national Feroz Abbasi, one of the Guantánamo detainees: “What appears to us to be objectionable is that Mr Abbasi should be subject to indefinite detention in territory over which the United States has exclusive control with no opportunity to challenge the legitimacy of his detention before any court or tribunal”.¹⁶⁸ It is deeply ironic that the USA is violating fundamental rights on Cuban soil, and relying on the fact that it is on Cuban soil to keep the US courts from examining its conduct. In its most recent criticism of the human rights situation in Cuba, the US State Department commented that the Cuban Constitution “states that all legally recognized civil liberties can be denied to anyone who actively opposes the decision of the Cuban people to build socialism. The authorities routinely invoked this sweeping authority to deny due process to those detained on purported state security grounds.” In the name of national security, the US Government is now denying due process to hundreds of detainees in Guantánamo Bay and elsewhere.

Even half a century ago, the *Eisentrager* ruling brought forth an impassioned dissent from three Supreme Court Justices: “The Court is fashioning wholly indefensible doctrine if it permits the executive branch, by deciding where its prisoners will be tried and imprisoned, to deprive all federal courts of their power to protect against a federal executive’s illegal incarcerations. If the opinion thus means, and it apparently does, that these petitioners are deprived of the privilege of habeas corpus solely because they were convicted and imprisoned overseas, the Court is adopting a broad and dangerous principle.”¹⁶⁹

Fifty-three years later, the UN Special Rapporteur on the independence of judges and lawyers echoed this dissent when he warned of the “dangerous precedent” that could be set by the federal court’s decision on the Guantánamo detainees. The US Government, the Special Rapporteur said, “will be seen as systematically evading application of domestic and international law so as to deny these suspects their legal rights”. He called on the USA to comply with international human rights and humanitarian law, adding that “the war on terrorism cannot possibly be won by the denial of legal rights, including fundamental principles of due process of those merely suspected of terrorism”.¹⁷⁰

On 8 May 2003, the UN Working Group on Arbitrary Detention, in the case of three French nationals – Mourad Benchellali, Khaled Ben Mustafa and Nizar Sassi – and Spanish national Hamed Aderrahaman Ahmed, all held in Guantánamo, said that it “cannot but conclude that no legal basis justifies the deprivation of liberty” of the four men. It stated that their detention was “arbitrary, being in contravention of Article 9 of the Universal Declaration of Human Rights and Article 9 of the International Covenant on Civil and Political Rights of which the United States of America is a Party”.¹⁷¹ The Working Group urged the US authorities to remedy the situation and bring it into conformity with international law.

One of the current US Supreme Court Justices, Sandra Day O’Connor, stated in 2000: “Our precedents demonstrate an attempt to strike a balance between the requirements of international law and respect for the judgment of the political branches in matters of foreign policy. It is obviously a delicate balance, and one that continues to be refined in the cases that require us to apply these doctrines”.¹⁷² Amnesty International believes that this balance has been tipped too far in favour of executive power in relation to the Guantánamo detainees.

Secret detentions and secret transfers

The more secret government is, the more likely you're going to have abuses – there's no question about it.

James Ziglar, former Commissioner of the US Immigration and Naturalization Service¹⁷³

Since the attacks of 11 September 2001, according to the US government, “more than 3,000 *al-Qa'ida* operatives or associates have been detained in over 100 countries, largely as a result of cooperation among law enforcement agencies”.¹⁷⁴ It is not known how many remain in custody, or the whereabouts, nationalities or identities of all of them. It is likely that the US government had a hand in, or knowledge of, many of the arrests. In some cases, detainees have been “rendered” to or from US custody. Renditions are transfers that bypass formal legal and human rights protections.

On 24 June 2003, five men were secretly transferred out of Malawi, reportedly in the custody of US government agents. Their transfer out of Malawi violated national law and circumvented any formal human rights protections.¹⁷⁵ The five – Turkish nationals Ibrahim Habaci and Arif Ulusam, Saudi national Faha al Bahli, Sudanese national Mahmud Sardar Issa, and Khalifa Abdi Hassan of Kenya – were arrested on 22 June 2003 in Blantyre, Malawi, on suspicion of being members of *al-Qa'ida*. According to information received by Amnesty International, the arrests were carried out by members of Malawi's National Intelligence Bureau together with US agents, reported to be members of the Central Intelligence Agency (CIA). The five men were initially held at an undisclosed location in Malawi without access to lawyers. According to Malawi law, suspects should be brought to court within 48 hours of their arrest, or released on bail. After defence lawyers intervened on the five men's behalf, the High Court of Blantyre ordered the detainees to be brought before it within 48 hours. The 48 hours expired at 19.30 local time on 24 June, by which time the men had not appeared before the court.

Earlier on 24 June, the five men had been flown out of Malawi, reportedly on a plane chartered by the USA, and taken to an undisclosed location in US custody for interrogation. An official of the Malawian government wrote to Amnesty International on 26 June that “the arrests were not done by the Malawi Police but by the National Intelligence Bureau and the USA Secret Agents who controlled the whole operation. From the time the arrests were made, the welfare of the detainees, their abode and itinerary for departure were no longer in the hands of the Malawian authorities. Thus as a country we did not have the means to stop or delay the operation. The issue of terrorism has regrettably spurred worldwide erosion of fundamental principles of human rights not only in the world but also in the USA itself... Malawi has had to cooperate with the USA on this request as we are under obligations internationally to assist... In Malawi we do not know where these people are but they are in hands of the Americans who took them out of the country using a chartered aircraft. They should now be going through investigations at a location only known by the USA.”

At the end of July, it was reported that the five had been taken to Zimbabwe and held there for a month before being sent to Sudan where they were released, apparently after no evidence was found linking them to *al-Qa'ida*. The outgoing US Ambassador to Malawi, Roger A.

Meece, reportedly denied that the US government had been involved in the detentions and transfers of the five men.¹⁷⁶ Earlier, President Bakili Muluzi of Malawi had stated that his government had joined forces with US agents to carry out the arrests as part of Malawi's commitment to the "war on terror". In late July, after the release of the five men in Sudan, President Muluzi was reported to have met the wives of two of the detainees. In an interview, the women said that he had apologized to them for their husbands' ordeal and that he had blamed their predicament on the US authorities. A Malawian radio journalist was later sacked for broadcasting the interviews, on the grounds of "shaming the President".

Amnesty International recognizes the duty of governments to protect the safety of the public, to investigate crime and to bring those responsible to justice. It also recognizes that governments will need to cooperate to this end where the threats or crimes in question cross national boundaries. At the same time, the organization stresses that human rights and respect for international law must be at the centre of the search for justice and security.

On 13 July 2003, alleged *al-Qa'ida* suspect Adil Al-Jazeerai was reportedly handed over to the US authorities by Pakistan. This Algerian national had been taken into custody in Peshawar on 17 June, and allegedly subjected to "tough questioning" by Pakistan agents. After almost four weeks in incommunicado detention, Adil Al-Jazeerai was taken, blindfolded and bound, to a US plane and flown out of Peshawar to an undisclosed location, possibly Bagram Air Base in Afghanistan, for interrogation in US custody.¹⁷⁷ Twenty months earlier, Yemeni national Jamil Qasim Saeed Mohammed, wanted in connection with the bombing of the ship the USS Cole in Yemen in 2000 in which 17 US servicemen were killed, was reportedly handed over in secret to US agents by Pakistani agents on 26 October 2001 and flown out of Karachi International Airport. Amnesty International first raised the case of Jamil Qasim Saeed Mohammed with the US authorities in April 2002.¹⁷⁸ It has received no reply and does not know his whereabouts or if he is in detention.

The US Government has given assurances not only that it will not condone torture by its own agents, but also that "if the war on terrorists of global reach requires transfers of detained enemy combatants to other countries for continued detention on our behalf, US Government instructions are to seek and obtain appropriate assurances that such enemy combatants are not tortured."¹⁷⁹ The *Washington Post*, however, has reported that, according to an official directly involved in "rendering" detainees to other countries: "We don't kick the [expletive] out of them. We send them to other countries so they can kick the [expletive] out of them."¹⁸⁰ Detainees are alleged to have been rendered to countries including Morocco, Jordan, and Egypt. It was reported, for example, that Jamil Qasim Saeed Mohammed, above, may have been taken to Jordan.

Article 3 of the Convention against Torture prohibits the transfer of anyone to another state where "there are substantial grounds for believing that he would be in danger of being subjected to torture." In its latest report on human rights in other countries, the US State Department reports that in Egypt "torture and abuse of detainees by police, security personnel, and prison guards was common and persistent". It also cited allegations of torture and ill-treatment of detainees in Jordan and Morocco. In the case of Jordan, it reported that "allegations of torture were difficult to verify because the police and security officials

frequently denied detainees timely access to lawyers”. So too is the case with detainees in US custody in Bagram Air Base and other locations.

A case which calls into question the USA’s stated commitment to Article 3 of the Convention against Torture is that of Maher Arar.¹⁸¹ He is a dual Canadian/Syrian national who was arrested in New York in September 2002 on suspicion of links with *al-Qa’ida*. He was reportedly expelled from the USA to Jordan without being represented at any hearing prior to deportation, and was not permitted to communicate with family or friends. The US Government also failed to provide information on his whereabouts and of the date and circumstances of his removal from the USA. The US government did not inform the Canadian authorities of his deportation.

In Jordan, Maher Arar was reportedly held in a debriefing station of the US Central Intelligence Agency,¹⁸² before being handed over to Syria on or around 21 October 2002. He was held without charge, and was feared to be at risk of torture or ill-treatment in Syrian custody. Amnesty International has documented torture in Syria over the years. The entry on Syria in the US State Department’s latest human rights report cites “credible evidence that security forces continued to use torture”. Maher Arar was reportedly held in a maximum security section of Sednaya prison. In August 2003, four months after Canadian officials last visited him, allegations emerged that he had been tortured during interrogation, including by being beaten with sticks and cables on the soles of his feet, being forced into a car tyre for hours, and subjected to electric shocks and sleep deprivation. In June 2003, the US government had stated that its policy was not to transfer anyone to a country where they may face torture, to seek assurances that torture will not be employed, and to “take steps to investigate credible allegations of torture and take appropriate action if there were reason to believe that those assurances were not being honored”.¹⁸³ The organization has called on the US authorities to take action on Maher Arar’s case.

Maher Arar could also face unfair trial if charged with a “terrorist” related offence. For example, Islamists are routinely tried before courts under procedures that violate minimum safeguards. Confessions taken often under torture or duress during prolonged incommunicado detention are presented before the courts as evidence. Trials are held routinely in secret especially in cases related to Islamists. In August it was reported that the Syrian authorities had stated that they would eventually charge Maher Arar with being a threat to national security, and had given assurances that Canadian officials would be able to visit him. However, no timeline was given on either.¹⁸⁴

In some cases, the detainee might not have ever been in US custody, but there may have been US involvement. For example, in January 2002 Muhammad Saad Iqbal Madni, reportedly a dual Egyptian/Pakistan national, was arrested in Indonesia at the alleged behest of the US Central Intelligence Agency. Two days later, without having access to the courts or a lawyer, the detainee was reportedly put on a US-registered jet and flown to Egypt.¹⁸⁵ In the case of Mohammed Haydar Zammar, a Syrian-born German national, who was arrested in Morocco in November 2001 before being secretly transferred to custody in Syria, the *Washington Post* reported senior Moroccan government sources as saying that US agents took part in his interrogation during his two-week detention in Morocco, and that US officials knew that he

would subsequently be transferred to Syria.¹⁸⁶ The *Washington Post* reported a former prisoner's claims suggesting that Zammar had been tortured in the *Far'Falastin* detention centre in Damascus, a facility run by military intelligence where many prisoners remain held incommunicado.¹⁸⁷

An unknown number of people are being held in undisclosed locations by the USA. These undisclosed locations are reported to include the base at Diego Garcia in the British Indian Ocean Territory. The former Ariana Hotel in Kabul in Afghanistan is also alleged to have been used for incommunicado interrogation by US agents. Amnesty International is concerned that not even the International Committee of the Red Cross may have access to these undisclosed locations. The organization does not know if the ICRC has been told by the US authorities of the location of these facilities.

According to US and allied security agents cited by the *Washington Post*, "free from the scrutiny of military lawyers" in such secret detention facilities, "the CIA and its intelligence service allies have the leeway to exert physically and psychologically aggressive techniques".¹⁸⁸ The *New York Times* cited "senior American officials" as saying that Khalid Shaikh Mohammed, another alleged leading member of *al-Qa'ida* held at an undisclosed location, would not be subjected to physical torture, but that his interrogators would rely on "what they consider acceptable techniques like sleep and light deprivation and the temporary withholding of food, water, access to sunlight and medical attention".¹⁸⁹

In the case of Abu Zubaydah, arrested in Pakistan in March 2002, it has been alleged that at the beginning of his detention, "painkillers were used selectively" by the US.¹⁹⁰ Abu Zubaydah, an alleged leading member of *al-Qa'ida* who is believed to remain in incommunicado US custody, had been shot in the groin at the time of his arrest. Abu Zubaydah has been detained in a secret location, as have numerous other detainees, including Abd al-Rahim al-Nashiri, a Saudi national arrested in November 2002, Ramzi bin al-Shibh, a Yemeni national arrested in Pakistan in September 2002, Sayf al-Islam al-Masri, arrested in October 2002 in Georgia, and Ibn al-Shaykh al-Libi, a Libyan national taken into US military custody in Afghanistan in January 2002. Amnesty International has had no response from the US authorities on the organization's inquiries about the legal status or whereabouts of people held in undisclosed locations.

The Human Rights Committee, in its authoritative interpretation of Article 7 ("no one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment") has stated: "To guarantee the effective protection of detained persons, provisions should be made for detainees to be held in places officially recognized as places of detention and for their names and places of detention, as well as for the names of persons responsible for their detention, to be kept in registers readily available and accessible to those concerned, including relatives and friends."¹⁹¹

Holding suspects in incommunicado detention in undisclosed locations, or rendering suspects between countries without any formal human rights protections, undermines the rule of law. In so doing, the USA flouts the very principles that it claims to be championing. It gives the lie to President Bush's assertion that the USA will always stand firm for the rule of law.¹⁹²

Captured far from the battlefield

“Please tell the person from Amnesty that I was with Fauzee two hours prior to his arrestment. He was captured on 19 May 2002, from [street address] Green Town, Karachi...His arrestment was witnessed”

Letter to the brother of Guantánamo detainee Ibrahim Fauzee, undated

On 17 July 2003, President Bush said of the Guantánamo detainees: “let me just say these were illegal combatants. They were picked up off the battlefield aiding and abetting the Taleban.”¹⁹³ The following cases illustrate that not all those held in Guantánamo Bay were taken into US custody on the actual “battlefield” of the international armed conflict in Afghanistan. There are an unknown number of such people held in the Naval Base. Their cases further demonstrate why all the detainees in all locations should be allowed to challenge the lawfulness of their detention in a court of law. They should be charged and tried in accordance with fair trial standards, without recourse to the death penalty, or released.

Bisher Al-Rawi and Jamil Al-Banna

The US State Department’s Country Reports on Human Rights Practices, released in March 2003, contain an entry on the Gambia. It includes the following criticism of the Gambia’s human rights record in 2002: “There continued to be reports that security forces mistreated detainees... Police and security forces arbitrarily arrested and detained citizens on a few occasions. Periods of detention ranged from a few hours to 2 weeks. There were reports that some detainees were held incommunicado.” What it does not say is that during the year, US agents were involved in the prolonged incommunicado detention of a number of people in the Gambia.

Bisher Al-Rawi, an Iraqi national legally resident in the United Kingdom (UK), Jamil Al Banna, a Jordanian national with refugee status in the UK, and a business associate, also a UK national, were arrested on arrival at Banjul airport on 8 November 2002 by members of the Gambian National Intelligence Agency (NIA). A fourth man, Bisher Al-Rawi’s brother, Wahab Al-Rawi, also a UK national, who had arrived in the Gambia some days earlier, and who had gone to the airport to meet them, was also arrested. The four men, all of whom were based in the UK, had reportedly travelled to the Gambia in connection with a peanut processing company set up by Wahab Al-Rawi.

According to information available to Amnesty International, after an initial period of questioning by NIA agents at the NIA headquarters in Banjul on the purpose of their visit to Gambia, questioning was taken over by US investigators. The men were held in several undisclosed locations in Banjul during this time. At least one of the men was reportedly threatened by US investigators who allegedly told him that unless he cooperated he would be handed over to the Gambian police who would beat and rape him. The US investigators also reportedly “apologized” for injuries sustained by one of the suspects during what they termed a scuffle with his Gambian guards.

Wahab Al-Rawi and the other man were released without charge on or around 5 December and were returned to the UK. It seems that Bisher Al-Rawi and Jamil Al-Banna were held incommunicado for a period of approximately two months in Banjul while they were questioned by US investigators on their alleged links with *al-Qa'ida*. Amnesty International received information indicating that both men were secretly transferred to the Bagram Air Base, probably in early January 2003. Their transfer to Bagram took place before they were allowed to consult with a lawyer, before any independent review of any evidence against them, and despite the fact that a *habeas corpus* petition on their behalf was pending in the courts.

In March, Jamil Al-Banna's wife, who was heavily pregnant, was informed that her husband had been transferred to Guantánamo Bay. She told Amnesty International that she had spoken to Bisher Al-Rawi's mother who had phoned her in tears after she too heard that her son was now in Guantánamo. Amnesty International has received no replies to its communications to the US government on this case.¹⁹⁴

Moazzam Begg

As with its entry on the Gambia in its most recent human rights report, the State Department is critical of Pakistan's record on arbitrary arrests during 2002. The report notes that Pakistan's "law prohibits arbitrary arrest and detention; however, the authorities did not always comply with the law, and police arbitrarily arrested and detained citizens."

Moazzam Begg, a 35-year-old man holding dual UK/Pakistan nationality, was allegedly seized by Pakistan and US agents in early 2002 from his flat in Islamabad in Pakistan. He was reported to have been taken away in the boot of a car and, despite a pending *habeas corpus* petition in court in Pakistan, in early February 2002 was transferred out of Pakistan and into US custody in the Air Base in Kandahar. He was subsequently transferred to the Bagram Air Base. Amnesty International first raised his case with the US authorities in April 2002, but received no reply to this or later communications. Amnesty International was concerned by reports in early 2003 indicating that Moazzam Begg's mental health had deteriorated, having been detained for a year in harsh conditions in US custody in Afghanistan, without access to a lawyer, his family or the courts. In November 2002, he had written to his father from Bagram, "boredom here is extreme. I have not seen the sun for over seven months except once, for around two minutes."¹⁹⁵

Moazzam Begg was transferred to Camp Delta in Guantánamo Bay in early February 2003. In July, a message was left on his father's telephone answering machine at his home in the UK. It was the UK Foreign Office informing him that his son had been named under the Military Order signed by President Bush in November 2001. This made Moazzam Begg eligible for trial by military commission.

Mohamedou Ould Slahi

Mohamedou Ould Slahi (also known as Sillahi) is a 32-year-old Mauritanian national. He was reportedly arrested by members of the Mauritania security forces in December 2001 at his parents' home in Nouakchott, capital of Mauritania. It seems that, in the absence of any

formal extradition proceedings, he was subsequently handed over to US agents on suspicion of links with *al-Qa'ida*. His family has not seen him since and there are reports that he was sent to Guantánamo.

Six Algerians seized in Bosnia-Herzegovina

The entry on Bosnia-Herzegovina (BiH) in the US State Department's recent human rights report contains the following: "On October 11, the BiH's Human Rights Chamber determined that the BiH and Federation governments violated human rights conventions in transferring four of six Algerian terrorism suspects to the custody of a foreign government in January... Additionally, the Chamber held that the BiH and the Federation governments should have sought assurances from the foreign government that it would not seek the death penalty against the detainees prior to their hand-over. The Chamber ordered both the BiH Federation governments to pay monetary compensation to each applicant and to engage attorneys on behalf of each applicant. The Chamber also ordered BiH to seek assurances that the death penalty would not be sought and to provide consular support to each of the applicants." What the entry did not say was that the "foreign government" was that of the USA.

Bansayah Belkacem, Lahmar Saber, Mustafa Ait Idir, Hadj Boudella a, Lakhdar Boumediene and Mohamed Nechle are Algerian nationals who were seized by US officials in Bosnia-Herzegovina on 18 January 2002 in violation of an order by the Human Rights Chamber for Bosnia and Herzegovina. The Chamber, which makes up part of the Bosnian Human Rights Commission, had ordered that four of the men should not be removed by force from Bosnia pending its final decision on the case. Their detention by the USA appears to have taken place outside both Bosnian and international law.

Under the General Framework Agreement for Peace in Bosnia and Herzegovina (Dayton Agreement), the Human Rights Chamber is vested with the authority to issue decisions binding upon both entities as well as the state authorities of Bosnia-Herzegovina. The decision by the Bosnian authorities to hand the men over to US custody ignored the Human Rights Chamber's order and undermines respect for this institution as well as adherence to international human rights law as prescribed by the Dayton Agreement. Amnesty International considers that the blatant flouting of an order by the Chamber in this case sets a dangerous precedent which may have far-reaching consequences for future adherence to applicable national and international law and implementation of the Chamber's decisions. The organization deeply regrets the involvement of the US authorities in such a potentially destructive step. The representative in Bosnia-Herzegovina of the UN High Commissioner for Human Rights, described the case of the Algerians as one of "extrajudicial removal from sovereign territory".

In the United Kingdom House of Lords in July 2003, responding to concern about UK nationals held in Guantánamo, a UK minister stated that "there is some evidence that family correspondence is not getting through".¹⁹⁶ This appears to be a problem not limited to the UK nationals, and is causing further distress to large numbers of detainees' relatives.

Hadj Boudellaa's wife has received very few letters from her husband. One recent one, which she received in January 2003, was postmarked 30 September 2002; a letter received by his

brother also took four months to reach him. Boudellaa's wife has told Amnesty International that she believed that her husband has only received three of the 60 letters she has written to him. She has been campaigning for his release and the release of the other five men and as a result has received several threatening telephone calls. Hadj Boudellaa and his wife have four children aged between one and 10 years, one of whom was born when Boudellaa was still in detention in Bosnia-Herzegovina. He only saw her once just before he was transferred to Guantánamo Bay.

The wife of Mustafa Ait Idir told Amnesty International in June 2003 that she had not heard from her husband since October 2002, although she is reported to have received a letter since, in which he writes: "I have been in this place day by day without knowing why I am here".¹⁹⁷ She was 17 weeks pregnant when her husband was transferred to Guantánamo Bay, and has since given birth to a child her husband has never seen.

Ibrahim Fauzee

Ibrahim Fauzee is from the Maldives. According to information received by Amnesty International, he was arrested in 2002 in Karachi, Pakistan, where he had been living as a student of Islamic Studies for about a year. During that time he had returned twice to visit his family in the Maldives. According to information received by Amnesty International, unknown to Ibrahim Fauzee, another of the occupants in the house in Karachi where he was renting a room was reported to be the father of an *al-Qa'ida* suspect. On 19 May 2002, according to a witness, US agents allegedly came to the house and arrested that occupant and Ibrahim Fauzee.

Ibrahim Fauzee's family heard no more for the next eight months, until they received a letter from him on 5 January 2003. The letter was dated 15 September 2002 and came to them via the International Committee of the Red Cross. It said "I was arrested in Karachi and am now in US custody. Please do not worry about me as I am fine. I hope that soon be free and able to meet you again. Please reply to this letter as quickly as possible. And tell me any news of my wife and baby, as I have heard nothing. I hope that soon my interrogation will prove my innocence and I will be released. Please pray for me, and please write me a letter as soon as possible". The family was told that he was being held in Guantánamo Bay.

The family, who believe that Ibrahim Fauzee has no connection to *al-Qa'ida* and is the victim of an arbitrary arrest, remain deeply concerned for his well-being and wish for his return. They have lobbied their own government to take action on his case, but have seen no progress as a result of their efforts.

In June 2003, Ibrahim Fauzee's brother said of his family "They cry, are very sad and my mother and father are worrying that something has happened. My father has had many problems because he is worried. I also feel very bad because it has been over one year, I don't know what has happened to him...". Since Ibrahim Fauzee has been in custody, his wife has given birth to their first child, a girl.

Trials by military commissions draw closer

To my mind, they are reminiscent of some of the kind of problems we had in some of the rogue governments in some countries, like in Nigeria years ago where they had kangaroo courts and sentenced people to imprisonment for long periods of time.

Param Cumaraswamy, UN Special Rapporteur on the independence of judges and lawyers¹⁹⁸

On 3 July 2003, it was revealed that President Bush had named six foreign nationals in US custody as being the first to be subject to his Military Order on the Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism. Under the Order, anyone so named can be held indefinitely without charge or trial, or brought to trial before military commissions with the power to hand down death sentences and against whose decisions there would be no right of appeal to any court.¹⁹⁹ The prospect of trials before these executive bodies – not independent and impartial courts – has caused international concern. It is not difficult to imagine the outrage of the US government if its citizens were subject to such unchallengeable executive power in other countries. Indeed, the US administration has exempted its own nationals from the scope of the Military Order.

President Bush signed the Military Order on 13 November 2001. The Pentagon released the procedures for military commissions on 21 March 2002²⁰⁰ and, on 30 April 2003, the Pentagon issued eight “instructions”, the main one of which listed crimes triable by military commission.²⁰¹ The fact that the list of crimes is lengthy but still only “illustrative” provides a further indication of the potentially broad sweep of the Order. On 1 July, the procedures and instructions were published as the “final rules”.²⁰²

Amnesty International believes that the Military Order should be revoked. It is fundamentally flawed, and any trial before the military commissions would be unfair. Justice would neither be done nor be seen to be done.

- The commissions will lack independence from the executive.
- The right to counsel of choice and to an effective defence is restricted.
- There will be no right of appeal to an independent and impartial court established by law. Even if acquitted by military commission, a defendant’s release is not guaranteed.
- The Military Order is discriminatory – second-class justice for non-US nationals. US citizens will not be subject to its provisions including trial by military commission, even if accused of the same offence as a foreign national. The commissions would allow a lower standard of evidence than is admissible in ordinary courts, including hearsay evidence and possibly evidence extracted under coercion.
- The Military Order allows indefinite, unchallengeable detention without trial. Anyone named under the Order cannot seek any remedy in any court anywhere in the world for any human rights violation that may have occurred while in custody or during trial by commission.

Lack of independence, lack of fair trial

Principle 1 of the UN Basic Principles on the Independence of the Judiciary states: “The independence of the judiciary shall be guaranteed by the State.” In the case of the military commissions, Air Force Colonel Will A. Gunn, Chief Defence Counsel for the commissions, said in May 2003 that “ultimately all roads lead back to the Pentagon, whether you’re talking about the military justice system or whether you’re talking about this [commission] system. However, that road is a lot shorter under this system.”²⁰³

The military commission system is an entirely closed loop, controlled by the executive. Between them, the President and the Secretary of Defence (or his designee) have the power to, for example: name who will be tried by the commissions; appoint the commission members, and to remove them; designate which member will serve as “judge” to preside over the proceedings; appoint the Chief Prosecutor and Chief Defense Counsel; approve the charges prepared by the prosecution; approve plea agreements; vet the level of investigative resources to be made available to the defence; decide which parts of the proceedings should be held *in camera*, and decide whether open proceedings may include attendance by the public and accredited media; pick the panel of three military officers (or civilians temporarily appointed as military officers) who would review the trial record; and make the final decision in any case, including in death penalty cases whether a condemned defendant will live or die.

Article 14(1) of the International Covenant on Civil and Political Rights (ICCPR) requires that all trials be conducted by a “competent, independent and impartial tribunal established according to law”. The Human Rights Committee has stated that the right to trial by a competent, independent and impartial tribunal is “an absolute right that may suffer no exception”. The military commissions will not be independent.²⁰⁴ Nor would they be courts “established according to law”, but executive bodies set up by presidential order.

The USA refused to grant prisoner of war status to any of the detainees. Prisoners of war are, like other detainees, entitled to a fair trial, as recognized by various articles of the Third Geneva Convention, to which the USA is a State Party. Article 84 states: “In no circumstances whatever shall a prisoner of war be tried by a court of any kind which does not offer the essential guarantees of independence and impartiality as generally recognized”.²⁰⁵

The Pentagon’s operating guidelines for the commissions include the presumption of innocence. However this guarantee has been repeatedly undermined by a pattern of public commentary on the presumed guilt of the detainees by the very officials that control the commissions. The Secretary of Defence has repeatedly referred to those held at Guantánamo Bay as “hard-core, well-trained terrorists”, and “among the most dangerous, best-trained, vicious killers on the face of the earth”, and has linked them directly to the attacks of 11 September 2001.²⁰⁶ The President has made similar statements. On 17 July 2003, he told the world’s press that “the only thing I know for certain is that these are bad people”.²⁰⁷

Restricted right to counsel of choice and to an effective defence

Article 14(3)(d) of the ICCPR requires that anyone facing a criminal trial be able to “defend himself in person or through legal assistance of his own choosing”. For the military

commissions, no defendant will be able to represent himself. The defendant is appointed a military lawyer to represent him, but may select another available US military lawyer to replace the appointed one. A defendant may, as long as there is no expense incurred by the US Government, retain a civilian lawyer, providing the latter is a US citizen with the necessary security clearance. In such a case the defendant will still be represented by the military lawyer – an individual under the ultimate authority of the executive – even if that goes against the defendant’s wishes. This violates Article 14 of the ICCPR.²⁰⁸

The restrictions placed on defence counsel would be substantial. Indeed, these “extraordinary restrictions” have led the National Association of Criminal Defence Lawyers to decide that it cannot advise any of its members to act as civilian counsel at Guantánamo: “The rules regulating counsel’s behaviour are just too restrictive to give us any confidence that counsel will be able to act zealously and professionally”.²⁰⁹

Any civilian lawyer who manages to qualify for the commissions may still be excluded from certain secret proceedings, and would not have access to certain classified information used at the trial, which only the military co-counsel would be granted. Civilian counsel would have to sign an agreement that he or she will not, without the approval of the authorities, travel from or transmit any documents from, the site of the trials (likely to be Guantánamo Bay). In addition, he or she will have to agree that there “may be reasonable restrictions on the time and duration of contact I may have with my client” which the military authorities may impose. They will have to agree that any communications with their client “may be subject to monitoring or review by government officials, using any available means”. Article 14(3)(b) of the ICCPR guarantees the right of defendants to communicate with counsel of their choosing. The Human Rights Committee has explained that this requires “counsel to communicate with the accused in conditions giving full respect for the confidentiality of their communications.”

No right of appeal to any court

Any convicted defendant will have his or her conviction and sentence reviewed by a three-member panel of military officers appointed by the “appointing authority” (the Secretary of Defence or his designee), the official who approved the charges. In closed session, this panel would review the record of the trial and make a recommendation. It can, but does not have to, consider written submissions from the defence and prosecution. The Secretary of Defence would then review the trial record and the review body’s recommendation. The final decision would reside with the President, the official who named the defendant eligible for trial in the first place, or the Secretary of Defence, if so designated by the President.

Article 14(5) of the ICCPR guarantees that “[e]veryone convicted of a crime shall have the right to his conviction and sentence being reviewed by a higher tribunal according to law”. The Human Rights Committee has stated: “The provisions of article 14 apply to all courts and tribunals” and that proceedings must “genuinely afford the full guarantees stipulated in article 14”. Under international safeguards, approved at the United Nations in 1984, “anyone sentenced to death shall have the right to appeal to a court of higher jurisdiction, and steps should be taken to ensure that such appeals shall become mandatory”.²¹⁰

Discriminatory

International law prohibits discrimination on the basis of nationality with regards to fair trial rights. To the extent that trials conducted under the provisions of the Military Order fall short of those afforded to US citizens accused of similar offences, and that this different treatment is inexplicable by any reasonable and objective criteria, the commissions will be discriminatory. Such discriminatory treatment would violate the principle that “all persons are equal before the law and are entitled without any discrimination to the equal protection of the law” as recognized in Article 26 of the ICCPR, which prohibits any discrimination, including on the basis of national origin. Indeed, it deprives persons tried before such executive bodies of their right, recognized in Article 14(1) of the ICCPR, to “be equal before the courts and tribunals”.²¹¹ The USA has ratified the Convention on the Elimination of All Forms of Racial Discrimination, Article 5 of which calls on states to “guarantee the right of everyone without distinction as to race, colour, or nationality or ethnic origin, to equality before the law”, including “equal treatment before the tribunals and all other organizations administering justice”.

In addition, Article 75(1) of the First Additional Protocol to the 1949 Geneva Conventions, which is applicable to all people captured in connection with an armed conflict, regardless of whether they are granted prisoner of war status, and which the USA recognizes reflects customary international law, states that: “persons who are in the power of a Party to the conflict and who do not benefit from more favourable treatment under the Conventions or under this Protocol shall be treated humanely in all circumstances and shall enjoy, as a minimum, the protection provided by this Article without any adverse distinction” including based upon national origin.

A backward step for human rights

The Human Rights Committee has stated: “The provisions of article 14 (of the ICCPR) apply to all courts and tribunals within the scope of that article whether ordinary or specialized. The Committee notes the existence, in many countries, of military or special courts which try civilians. This could present serious problems as far as the equitable, impartial and independent administration of justice is concerned. Quite often the reason for the establishment of such courts is to enable exceptional procedures to be applied which do not comply with normal standards of justice. While the Covenant does not prohibit such categories of courts, nevertheless the conditions which it lays down clearly indicate that the trying of civilians by such courts should be very exceptional and take place under conditions which genuinely afford the full guarantees stipulated in article 14.”²¹²

The creation of a separate system of trials before executive bodies for those who may yet face criminal charges in connection with the crimes of 11 September or other serious human rights abuses is contrary to international standards.²¹³ The USA claims to be a progressive force for human rights. Military commissions have not been used for more than half a century in the USA – a period which has seen the reinforcement of a broad framework of fair trial guarantees in international human rights law and standards and in international humanitarian law. Executive military commissions have no place in 21st century criminal justice systems.

The threat of the death penalty

There have been recent reports that execution facilities are being built inside the Guantánamo Bay detention centre. The death penalty, be it on Cuban soil or in the United States, or anywhere else in the world, is an affront to humanity.

Peter Scheider, President, Parliamentary Assembly of the Council of Europe, 23 June 2003²¹⁴

Plans for a possible execution chamber at Guantánamo Bay have been discussed. While shocking, this was unsurprising given that the military commissions envisioned by President Bush's Military Order of November 2001 will have the power to hand down death sentences.

Only a unanimous panel of seven military commissioners can impose a death sentence. Any trials before commissions of three to six commissioners, therefore, could not. Aside from this, the Pentagon's guidelines for the operation of the commissions do not indicate which crimes will be considered capital, and provide little guidance on sentencing.

The Pentagon's guidelines suggest that the commissioners should bear several factors in mind when determining sentence, such as societal protection, deterrence, rehabilitation and punishment of the wrongdoer. However, the guidelines also state that all sentences should be "grounded in a recognition that military commissions are a function of the President's war-fighting role as Commander-in-Chief of the Armed Forces of the United States and of the broad deterrent impact associated with a sentence's effect on adherence to the laws and customs of war in general".

President Bush is a well-known supporter of capital punishment. His five-year term as Governor of Texas saw 152 executions in that state. His presidency has seen the first three federal executions in the USA in nearly 40 years. President Bush, who signed the Military Order providing for military commissions and allowing these executive bodies to have the power to hand down death sentences, will name which foreign nationals will be eligible for trial by military commission. In the cases of defendants sentenced to death by the commissions, he (or the Secretary of Defence if he so designates) who will have the final word on which of them will live and which will die.

President Bush's record on clemency when he was governor of Texas and since he took office in the White House gives serious cause for concern. Documentary evidence obtained by a journalist suggests that his decisions on whether or not to intervene in Texas executions were based on cursory and pro-prosecution information.²¹⁵ Many of the executions under his governorship violated international standards, including the execution of child offenders, the mentally impaired, the inadequately represented, individuals whose guilt was still in doubt, and foreign nationals denied their consular rights.²¹⁶ Amnesty International believes that any execution carried out pursuant to a judgment by the proposed military commissions would violate the USA's international obligations.

Article 75 of the first Additional Protocol to the Geneva Conventions, which reflects customary international law, state: "No sentence may be passed and no penalty may be executed on a person found guilty of a penal offence related to the armed conflict except pursuant to a conviction pronounced by an impartial and regularly constituted court respecting

the generally recognized principles of regular judicial procedure”. The military commissions will not be regularly constituted courts, but executive bodies under the control of the President, with rules and procedures created by the Pentagon. Article 75(8) states that no provision of the “fundamental guarantees” enshrined in Article 75 “may be construed as limiting or infringing any other more favourable provision granting greater protection, under any applicable rules of international law”.²¹⁷

Article 6 of the International Covenant on Civil and Political Rights protects the right to life. The Human Rights Committee has stated in an authoritative interpretation of Article 6 that the right to life “is the supreme right from which no derogation is permitted even in time of public emergency which threatens the life of the nation... It is a right which should not be interpreted narrowly.”²¹⁸

Article 6 prohibits the arbitrary deprivation of life, and places strict safeguards on the use of the death penalty in those countries which still retain this punishment. The Human Rights Committee states that “The procedural guarantees therein prescribed must be observed, including the right to a fair hearing by an independent tribunal, the presumption of innocence, the minimum guarantees for the defence, and the right to review by a higher tribunal. These rights are applicable in addition to the particular right to seek pardon or commutation of the sentence.”²¹⁹ The Human Rights Committee has stated that governments “may in no circumstances” derogate from principles of “humanitarian law or peremptory norms of international law, “for instance...through arbitrary deprivations of liberty or by deviating from fundamental principles of fair trial”.²²⁰

The UN Safeguards Guaranteeing Protection of the Rights of Those Facing the Death Penalty state: “Capital punishment may only be carried out pursuant to a final judgement rendered by a competent court after legal process which gives all possible safeguards to ensure a fair trial, at least equal to those contained in article 14 of the International Covenant on Civil and Political Rights” and: “Anyone sentenced to death shall have the right to appeal to a court of higher jurisdiction, and steps should be taken to ensure that such appeals shall become mandatory”.

Over the past three decades the USA has become increasingly isolated on the question of capital punishment. Since 1976, when the US Supreme Court lifted the *de facto* moratorium on executions it had imposed four years earlier, more than 60 countries have abolished the death penalty in law. In the same period, the US has executed more than 870 people, the vast majority in the past decade. Today, with 112 countries abolitionist in law or practice, there looms the prospect of the USA resorting to executions after trials by military commission which flout basic standards of justice.

“Enemy combatants” detained on US soil

The courts must at some point choose between deference to the president’s war powers and protecting the liberty of Americans. Here’s hoping the Supreme Court makes a better choice.

Editorial, Washington Post, 20 July 2003²²¹

Two US nationals have been designated as “enemy combatants” and held without charge or trial in military custody in the USA for more than a year. In December 2002, the UN Working Group on Arbitrary Detention described their detention as “arbitrary” with regard to Articles 9 and 14 of the International Covenant on Civil and Political Rights.²²² In addition, a Qatar national was recently designated by President Bush as an “enemy combatant” and transferred from the normal justice system to military custody. The three cases fuel concern about the administration’s attitude to the rule of law in its “war on terror”.

Jose Padilla

Jose Padilla is a US citizen, born in New York, who converted to Islam. He was arrested at Chicago airport on 8 May 2002 on alleged suspicion of conspiracy to detonate a radioactive “dirty bomb” in a US city. He was originally held in the custody of the Justice Department as a “material witness” in a grand jury probe, where he was given access to an attorney. However, on 9 June 2002 he was transferred to military custody on the basis of a one-page order by President Bush designating him to be an “enemy combatant” closely associated with *al-Qa’ida*, whose detention was necessary to prevent him from aiding an attack on the United States. Since then, he has been held in solitary confinement without charge or trial, and without access to an attorney or to his family in a navy jail in Charleston, South Carolina. Attorney General John Ashcroft has described Jose Padilla as a “known terrorist”.²²³

Jose Padilla’s lawyer challenged the legal basis for his detention, and also sought access to her client. In December 2002, a District Court upheld the president’s authority to detain “enemy combatants”, even if they were US citizens, with only limited right of judicial review. However, the court also ruled that Jose Padilla was entitled to consult with, and be visited by, his lawyer, in order to have some opportunity to present facts to rebut the government’s evidence. The government has appealed this decision on the ground that granting Jose Padilla access to an attorney would undermine the “trust and dependency” on the military that is “essential to effective interrogation”. Jose Padilla remains in incommunicado detention pending the outcome of the appeal to the Second Circuit Court of Appeal.

Yaser Hamdi

Yaser Esam Hamdi was taken into US custody in Afghanistan in late 2001. In January 2002 he was transferred to Camp X-Ray in Guantánamo Bay, on the assumption that he was a foreign national. In April 2002, after the authorities discovered a birth certificate confirming his claim that he was born in Louisiana to Saudi parents, Yaser Hamdi was transferred to the US Naval Station in Norfolk, Virginia, where he has been held in military custody ever since as an “enemy combatant”. It is believed that the International Committee of the Red Cross has had access to him, unlike in Padilla’s case, but that he is otherwise held incommunicado.

Yaser Hamdi's father, Esam Fouad Hamdi, filed a *habeas corpus* petition which alleged that his son was held in violation of his constitutional rights as a US citizen. On 11 June 2002, the District Court appointed the federal public defender as counsel to Yaser Hamdi and ordered the government to have unmonitored access to him.

The government appealed to the US Court of Appeals for the Fourth Circuit, which remanded the case back to the District Court for reconsideration. In August 2002, the District Court ordered the government to produce the factual evidence supporting its claim that Yaser Hamdi was an enemy combatant. The Court said that the government's evidence to date, a two-page affidavit from the Special Adviser to the Under Secretary of Defence for Policy, Michael Mobbs ("Mobbs declaration"), had fallen "far short" of the minimal criteria for judicial review. The judge said: "While it is clear that the Executive is entitled to deference regarding military designations of individuals, it is equally clear that the judiciary is entitled to a meaningful judicial review of those designations when they substantially infringe on the individual liberties... of American citizens." The judge refused to act as a "rubber-stamp" for the government, and noted that "we have prided ourselves on being a nation of laws applying equally to all and not a nation of men who have few or no standards".

The Government again appealed, and on 8 January 2003, a three-judge panel of the Fourth Circuit held that because "it is undisputed that Hamdi was captured in a zone of active combat in a foreign theatre of conflict, we hold that the [Mobbs] declaration is a sufficient basis upon which to conclude that the Commander in Chief has constitutionally detained Hamdi pursuant to the war powers entrusted to him by the United States Constitution." The defence appealed to have the full Fourth Circuit rehear the case. On 9 July 2003, the judges voted 8-4 against a rehearing. One of the dissenting judges deplored the panel's holding that "a short hearsay declaration by Mr Michael Mobbs – an unelected, otherwise unknown, government 'advisor'" – was sufficient to allow meaningful judicial review. She concluded that "to justify forfeiture of a citizen's constitutional rights, the Executive must establish enemy combatant status with more than hearsay." She called the decision "breathtaking", especially as the panel had rested its decision on the "undisputed fact" that Hamdi was captured in a zone of active combat, when "Hamdi has never been given the opportunity to dispute any facts".²²⁴

Ali Saleh Kahlah al-Marri

In a one-page order on 23 June 2003, President Bush declared Qatar national Ali Saleh Kahlah al-Marri to be an "enemy combatant", and he was transferred from the control of the Department of Justice to incommunicado solitary confinement in a military facility in South Carolina. This happened less than a month before al-Marri was due to go to trial on charges of fraud and lying to the Federal Bureau of Investigation. The Pentagon said that President Bush had taken this action "due to recent credible information provided by other detainees in the War on Terrorism".²²⁵ A former judge on the Superior Court of New Jersey wrote: "The very core of American history, law and culture condemns the ideas of punishment before trial, denial of due process and secret government by fiat... Who is an enemy combatant? Today, it can be anyone the president wants. And that is terrifying".²²⁶

Recommendations

Amnesty International calls on the US Government to:

- revoke the Military Order of 13 November 2001;
- drop all plans for trials by military commissions;
- arrange the voluntary repatriation of those detained as combatants during the international armed conflict in Afghanistan, unless they are charged with recognizably criminal offences or would face serious human rights violations if returned;
- ensure that all other detainees are either charged with recognizably criminal offences, and brought to trial within a reasonable time in proceedings that fully meet international norms, with full access to legal counsel, or else released;
- reject pursuit of the death penalty against any detainee;
- ensure all detainees are treated humanely and are not subjected to any treatment which would violate international law and standards, including “stress and duress” techniques such as sleep deprivation, prolonged forced standing or kneeling, hooding, and inappropriate use of restraints;
- ensure that all detainees held in undisclosed locations are immediately afforded all due safeguards under international law, including the right to inform family members of their place of detention and immediate access to the International Committee of the Red Cross;
- in addition to making public the results of the investigation into the two deaths in Bagram in December 2002, initiate a full and impartial inquiry into the past and present conditions of detention in Bagram Air Base, with a view to making its findings public and bringing to justice anyone responsible for torture or ill-treatment;
- suspend any interrogations that may have any prosecutorial purpose until and unless legal counsel is provided to the detainee in question;
- while detainees are still held in Guantánamo Bay, to ameliorate conditions there, paying particular attention to increasing the amount of out-of-cell time;
- ensure any children in detention in Guantánamo Bay or in US custody at other locations outside the USA are immediately transferred to more suitable circumstances in the USA or elsewhere, and ensure that their treatment takes full account of their age and particular needs with a view to their reintegration into society as soon as possible;

- adhere to its obligation under the Optional Protocol to the Convention on the Rights of the Child to assist in the demobilization and rehabilitation of any former child soldiers among the detainees;
- respect fully extradition and human rights protections when transferring prisoners between countries, and to cease the practice of clandestine renditions;
- consistent with government policy expressed by Department of Defence General Counsel William Haynes in his letter of 25 June 2003 to Senator Patrick Leahy, investigate the allegations of torture in Syria of Maher Arar, deported from the USA via Jordan in October 2002, and to make all findings public;
- investigate the killings of six men in Yemen in November 2002, allegedly by CIA-controlled Predator drone, under international standards prohibiting extrajudicial killing, and to make all findings public;
- grant Amnesty International access to detainees and officials in Bagram Air Base and US Naval Base in Guantánamo Bay;
- engage constructively with all bodies which make recommendations on detainees in US custody, including the UN Working Group on Arbitrary Detention and the Inter-American Commission on Human Rights, and to heed concerns from other bodies such as the European Union and the Council of Europe Parliamentary Assembly;
- withdraw its reservation to Article 16 of the Convention against Torture and Article 7 of the International Covenant on Civil and Political Rights, and publicly state the USA's commitment to take a progressive interpretation of the prohibition on cruel, inhuman and degrading treatment or punishment.

Endnotes

¹ Remarks at Briefing on the State Department's 2002 Country Reports on Human Rights Practices, Secretary Colin L. Powell, Washington, DC, March 31, 2003.

² Letter to Senator Patrick J. Leahy from William J. Haynes II, dated 25 June 2003.

³ Letter to Amnesty International Secretary General Irene Khan, dated 11 July 2003, from Lorne W. Craner, Assistant Secretary for Democracy, Human Rights and Labor. US Department of State.

⁴ This paper updates Amnesty International's concerns expressed in a number of documents, for example, *Memorandum to the US Government on the rights of people in US custody in Afghanistan and Guantánamo Bay* (AMR 51/053/2002, April 2002), and *Beyond the law: update to Amnesty International's April Memorandum to the US Government on the rights of detainees held in US custody in Guantánamo Bay and other locations* (AMR 51/184/2002, December 2002).

⁵ John Brady Kiesling's letter of resignation from the Foreign Service of the United States and his position as Political Counselor in US Embassy in Athens. Reprinted in the New York Times, 27 February 2003.

⁶ See, for example: *Double standards: The USA and international human rights protection*. Chapter 7 of *Rights for All* (Amnesty International Index: AMR 51/35/98, October 1998).

⁷ The Optional Protocol was adopted by the UN Economic and Social Council in July 2002 despite US attempts to block it. See *UN: Time for decisive action to prevent torture* (IOR 40/018/2002, 23 July 2002) and *UN: Crucial Vote at ECOSOC on The Draft Optional Protocol to the UN Convention against Torture* (IOR 40/020/2002, 24 July 2002). The Optional Protocol was adopted by an overwhelming majority at the UN General Assembly in November 2002. The USA voted against. *UN: NGOs welcome new treaty to prevent torture* (IOR 40/038/2002, 7 November 2002).

⁸ A Review of the Treatment of Aliens Held on Immigration Charges in Connection with the Investigation of the September 11 Attacks, Office of the Inspector General, June 2003.

⁹ Amnesty International's concerns regarding post September 11 detentions in the USA. AI Index: AMR 51/044/2002, March 2002. <http://web.amnesty.org/library/Index/ENGAMR510442002>

¹⁰ Department of Defence News Briefing, 25 April 2003.

¹¹ Secretary Rumsfeld interview with the Sunday Times. Department of Defence News Transcript, 21 March 2002.

¹² Press Briefing, White House, 28 May 2003.

¹³ The European Parliament "calls on the Council Presidency to sponsor a resolution calling on the US immediately to clarify the situation of prisoners in Guantánamo or those recently transferred from there to other parts of the US in order to finally respect international law, to release those against whom there are no retainable charges and to take the necessary steps to ensure that basic safeguards are respected". European Parliament resolution on the EU's rights, priorities and recommendations for the 59th Session of the UN Commission on Human Rights in Geneva (17 March to 25 April 2003). 30 January 2003.

¹⁴ "The Assembly is deeply concerned at the conditions of imprisonment of these persons as such which it considers unacceptable, and it believes that their status being undefined, their detention, to be unlawful". *Rights of persons held in the custody of the United States in Afghanistan or Guantánamo Bay*. Resolution 1340 (2003), adopted 26 June 2003.

¹⁵ *Abbasi v Secretary of State*. Court of Appeal England and Wales, 6 November 2002.

¹⁶ Early Day Motion 1035, 8 April 2003.

¹⁷ Preface to State Department's 2002 Country Reports on Human Rights Practices, March 2003.

¹⁸ Opinion No. 5/2003 (United States of America). 8 May 2003.

¹⁹ The World this Weekend. BBC Radio 4, 13 July 2003.

²⁰ Release of the Country Reports on Human Rights Practices for 2001. Remarks to the Press. Washington DC. 4 March 2002.

²¹ *The Guantánamo Scandal*. New York Times, Editorial 15 May 2003.

²² *Impasse at Guantánamo*. Chicago Tribune, Editorial, 17 May 2003.

²³ *End the legal limbo for Guantánamo detainees*. Newsday, Editorial, 3 June 2003.

²⁴ See Powell urges Pentagon to act on detainees. Associated Press, 7 May 2003.

²⁵ Press Conference at the French American Press Club, Hotel Clarion St. James et Albany, Paris, France. 22 May 2003.

²⁶ *Dagens Nyheter*, (Swedish daily newspaper) 13 June 2003.

²⁷ *No release in sight for Swede held at Guantánamo Bay: US*. Agence France Presse, 17 July 2003.

²⁸ *Criticism of USA won't help Swede held at Guantánamo Bay*. Report on Radio Sweden, monitored by BBC, 3 July 2003.

²⁹ Statement by the Press Secretary, White House, 18 July 2003.

³⁰ Department of Defence statements on British detainee meetings and Australian detainee meetings. 23 July 2003. In the cases of Feroz Abbasi, Moazzam Begg and David Hicks, the US said that not only that the death penalty would not be pursued but that the evidence against the detainees was such that conversations between the detainees and defence counsel would not be monitored.

³¹ *Madrid to seek details on Spanish national detained in Guantánamo*. AFP, 24 July 2003.

³² Speech by the President of the Parliamentary Assembly of the Council of Europe Peter Schieder at the opening of the summer 2003 part-session of the Assembly. Strasbourg. 23 June 2003.

³³ National Strategy for Combating Terrorism. February 2003.

³⁴ The National Security Strategy of the United States of America. September 2002.

³⁵ Those held in Guantánamo and elsewhere by the USA in its "war on terror" are not held under the Military Order, but according to the US government "under the President's authority as Commander in Chief and under the laws and usages of war" (*Rasul v Bush*, US District Court, District of Columbia. Respondents' motion to dismiss petitioners' first amended petition for writ of habeas corpus. 18 March 2002).

³⁶ Department of Defence. Military commission instruction no.2: Crimes and elements for trials by military commission. Section 5(c).

³⁷ *United Nations rights expert "alarmed" over United States implementation of military order*. United Nations Press Release, 7 July 2003.

³⁸ Interviewed on The World this Weekend. BBC Radio 4, 13 July 2003.

³⁹ The government has maintained that the Afghan and Iraq conflicts are "two different situations. You have the war against terrorism, and then you have this [Iraq] conflict, which is much more of a traditional conflict." (Ari Fleischer, White House Press Briefing, 24 March 2003). However, one of the federal judges who agrees with the main governmental position on its detention powers has nevertheless said: "The conflict in Afghanistan is certainly related to the global conflict referred to as the 'war against terror', but it is unquestionably a military conflict that falls quite neatly within our historical concepts of war". (*Hamdi v Rumsfeld*, US Court of Appeals for the Fourth Circuit, Judge Traxler concurring in the denial of rehearing en banc, 9 July 2003.) See also: *International standards for all*. <http://web.amnesty.org/library/Index/ENGAMR510452003>

⁴⁰ "There are divergent views between the United States and the ICRC on the procedures which apply on how to determine that the persons detained are not entitled to prisoner of war status." ICRC press release, 9 February 2002.

⁴¹ Chris Mullin, answering questions in House of Commons on British nationals in Guantánamo Bay, 7 July 2003.

⁴² *Enemy combatant taken into custody*. Department of Defence News Release, 23 June 2003.

⁴³ “*Enemy*” includes any entity with which the United States or allied forces may be engaged in armed conflict, or which is preparing to attack the United States. It is not limited to foreign nations, or foreign military organizations or members thereof. “*Enemy*” specifically includes any organization of terrorists with international reach”. Department of Defence, Military Commission Instruction No. 2, 30 April 2003.

⁴⁴ “Some have met their fate by sudden justice; some are now answering questions at Guantánamo Bay. In either case, they’re no longer a problem to the United States of America and our friends.” *President rallies troops at Fort Hood*. White House transcript. 3 January 2003.

⁴⁵ Letter dated 14 April 2003 from the Chief of Section, Political and Specialized Agencies, of the Permanent Mission of the United States of America to the United Nations Office at Geneva addressed to the Secretariat of the Commission on Human Rights. E/CN.4/2003/G/80, 22 April 2003.

⁴⁶ The exception is the case of armed groups fighting against colonial domination, which is not relevant to what the USA deems to be its “war on terror”.

⁴⁷ The Yemeni Minister of Interior was reported on 19 November 2002 by Agence France Presse to have said that the “hunt for the group which ended in their deaths...took place in the context of security cooperation and coordination between Yemen and the United States to fight terrorism”. More recently, the Yemeni President reiterated his government’s role in the operation during an interview with *al-Jazeera* television, broadcast on 16 July 2003 (Program: *Without Frontiers* [Bila hudud]). In reply to a question on how the US attacked the six he replied “in coordination with us, in coordination with us...”.

⁴⁸ Basic Principles on the Use of Force and Firearms by Law Enforcement Officials.

⁴⁹ Letter dated 2 April 2003 from the Permanent Mission of the United States of America to the United Nations Office at Geneva addressed to the secretariat of the Commission on Human Rights. E/CN.4/2003/G/73.

⁵⁰ E/CN.4/2003/G/80, 22 April 2003.

⁵¹ Background briefing on military commissions, Department of Defence news briefing, 3 July 2003.

⁵² In the case of the “Lackawanna Six”, this is alleged to have happened. The six young men – Sahim Alwan, Yahya Goba, Yasein Taher, Faysal Galab, Shafal Mosed and Mukhtar al-Bakri – were arrested in Lackawanna, New York State, on 13 September 2002 on suspicion of being an al-Qa’ida “sleeper cell”. In 2003 they pleaded guilty to terrorism charges and accepted prison terms of up to nine years. One of their lawyers said: “We had to worry about the defendants being whisked out of the courtroom and declared enemy combatants if the case started going well for us. So we just ran up the white flag and folded”. The Chairman of the American Bar Association’s Task Force on Treatment of Enemy Combatants said: “The defendants believed that if they didn’t plead guilty, they’d end up in a black hole forever. There’s little difference between beating someone over the head and making a threat like that”. *No choice but guilty*. Washington Post, 29 July 2003.

⁵³ *Hamdi v Rumsfeld*, US Court of Appeals for the Fourth Circuit, 9 July 2003. Denial of petition for a rehearing *en banc*.

⁵⁴ UN Doc. CCPR/C/39/D/305/1988. 15 August 1990.

⁵⁵ *Standards for detainees*. Washington Post, 6 July 2003.

⁵⁶ Financial Times (UK), 17 July 2003.

⁵⁷ Statement by the President. United Nations International Day in Support of Victims of Torture, 26 June 2003.

⁵⁸ The International Committee of the Red Cross has had access to the Guantánamo detainees and people held in Bagram Air Base, although the latter is not believed to have been full unrestricted access.

ICRC policy is to make its concerns and recommendations known to the detaining power, rather than to make its findings public.

⁵⁹ Testimony of Cofer Black, Hearing before the Senate and House Intelligence Committees, 26 September 2002.

⁶⁰ *Iraq: Memorandum on concerns relating to law and order*, MDE 14/157/2003, 23 July 2003. <http://web.amnesty.org/library/Index/ENGMDE141572003>.

⁶¹ *US decries abuse but defends interrogations*. Washington Post, 26 December 2002.

⁶² Declaration of Donald D. Woolfolk, 13 June 2002. In *Hamdi v Rumsfeld* proceedings.

⁶³ Ari Fleischer, White House Press Briefing, 3 March 2003.

⁶⁴ Letter to US Senator Patrick J. Leahy from William J. Haynes, dated 25 June 2003.

⁶⁵ CCPR/C/79/Add.50; A/50/40, paras.266-304, 3 October 1995.

⁶⁶ *Conclusions and Recommendations of the Committee against Torture : United States of America*. 15 May 2000. A/55/44, paras.175-180.

⁶⁷ The Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment state that “the term “cruel, inhuman or degrading treatment or punishment” should be interpreted so as to extend the widest possible protection against abuses, whether physical or mental, including the holding of a detained or imprisoned person in conditions which deprive him, temporarily or permanently, of the use of any of his natural senses, such as sight or hearing, or of his awareness of place and the passing of time”.

⁶⁸ A/55/44, paras.175-180, May 2000.

⁶⁹ The Committee against Torture also considers the remote-controlled electro-shock stun belt, used in numerous jurisdictions in the USA, to be in violation of Article 16 of the Convention, and has called for an end to its use. The USA has not complied with this recommendation. A/55/44, paras.175-180, May 2000. See *USA: Cruelty in control? The stun belt and other electro-shock equipment in law enforcement*. AMR 51/54/99, June 1999. In addition, in a world in which a majority of countries have abolished the death penalty in law or practice, the US Supreme Court has not even found the execution of the mentally ill or people who were still children at the time of the crime, or keeping people on death row for decades before killing them, to be unconstitutionally cruel.

⁷⁰ Among methods of interrogation cited in UN Doc. CAT/C/SR.297, reporting on Israel’s compliance with the Convention against Torture; the committee recommended that interrogation by Israeli security officers applying these methods “cease immediately”.

⁷¹ The government denied that Lindh’s treatment amounted to torture, or that he had been threatened with death or torture. *A note about “torture”*. In *USA v Lindh*, Government’s opposition to defendant’s motion to compel discovery of documents filed in camera. US District Court for the Eastern District of Virginia, 29 March 2002.

⁷² *USA v Lindh*, in the US District Court for the Eastern District of Virginia. Plea agreement, 15 July 2002. John Walker Lindh was sentenced to 20 years in prison in October 2002. If he had gone to trial and been found guilty under the government’s original indictment, he could have received a sentence of life imprisonment without parole. The sentence received under the plea agreement means that he could be released in less than 17 years with good conduct.

⁷³ Statement by the President. United Nations International Day in Support of Victims of Torture, 26 June 2003.

⁷⁴ *Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism*. Military Order, signed by President Bush 13 November 2001.

⁷⁵ “Provisions should also be made against incommunicado detention”, as a safeguard against torture and ill-treatment. Human Rights Committee General Comment 20, para. 11.

⁷⁶ “Prolonged incommunicado detention may facilitate the perpetration of torture and can in itself constitute a form of cruel, inhuman or degrading treatment”. Resolution 1997/38, para. 20.

⁷⁷ “Torture is most frequently practiced during incommunicado detention. Incommunicado detention should be made illegal and persons held incommunicado should be released without delay. Legal provisions should ensure that detainees be given access to legal counsel within 24 hours of detention”. Report of the Special Rapporteur on torture, UN Doc. E/CN.4/1995/434, para. 926(d).

⁷⁸ Incommunicado detention “creates a situation conducive to other practices including torture”. OEA/Ser.L/V/II/61, doc.22.rev.1, 1 July 1981, at 41-42.

⁷⁹ Statement by the Press Secretary on the Geneva Convention.

⁸⁰ *Prisoners released from US base in Afghanistan*. Associated Press, 15 March 2003.

⁸¹ Spoken through an interpreter.

⁸² Agence France Presse, 3 March 2003, quoting Colonel Roger King, the chief spokesman for the military at Bagram.

⁸³ ICRC policy does not allow it to make public its findings in detention facilities. It is likely, however, that numerous detainees have not been seen by the ICRC, even if only because it does not have a permanent delegation at Bagram. If the ICRC delegate(s) visits the base, say, once or twice a month, any detainee who is detained and released between visits will not be seen. It could be considered unlikely that the US authorities have given the ICRC the names of all such detainees for the organization to be able to follow up.

⁸⁴ For example *US decries abuse but defends interrogations*. Washington Post, 26 December 2002. In another report, a “Western intelligence official” quoted by the *New York Times* described the interrogation in Bagram of Omar al-Faruq, an alleged senior *al-Qa’ida* operative, as “not quite torture, but about as close as you can get”. The official reported said that over a three-month period, Omar al-Faruq was “fed very little, while being subjected to sleep and light deprivation, prolonged isolation and room temperatures that varied from 100 degrees to 10 degrees.” *Questioning terror suspects in a dark and surreal world*. New York Times, 9 March 2003.

⁸⁵ Letter to Senator Patrick J. Leahy, dated 25 June 2003, from William J. Haynes II, General Counsel of the Department of Defence.

⁸⁶ *The investigation into killings and alleged ill-treatment of detainees by US soldiers*. Pages 17-21 of *Memorandum to the US Government on the rights of people in US custody in Afghanistan and Guantánamo Bay*, April 2002. <http://web.amnesty.org/library/Index/ENGAMR510532002>

⁸⁷ For example, on 29 May 2003, the USA expressed its “utmost concern” about the death in custody of Orif Eshanov in Uzbekistan two weeks earlier, possibly as a result of beatings and torture. It noted that the Uzbekistan authorities had promised to conduct a full investigation, and it insisted that anyone found responsible for the death should be prosecuted, and the results of such prosecutions made public. Statement by Douglas A. Davidson, Chargé d’Affaires at the US Permanent Mission to the Organization for Security and Cooperation in Europe delivered to the OSCE Permanent Council in Vienna on 29 May 2003.

⁸⁸ The detainee was later reported to be Abdul Walli. By the first week of August, Amnesty International had not received a reply to its letter of 23 June 2003.

⁸⁹ The State Department’s recent reporting on Yemen, scores of whose nationals are among those who have been held in Bagram and Guantánamo, include the finding that “detainees in some instances were confined in leg-irons and shackles, despite a law outlawing this practice”. In the case of Pakistan, whose nationals have also been among the detainees in US custody, the State Department noted that “shackling of prisoners was routine. The shackles used were tight, heavy, and painful”.

⁹⁰ *US military investigating death of Afghan in custody*. New York Times, 4 March 2003.

⁹¹ *Prisoners released from US base in Afghanistan*. Associated Press, 15 March 2003.

⁹² *US military investigating death of Afghan in custody*. New York Times, 4 March 2003.

⁹³ *Prisoners released from US base in Afghanistan*. Associated Press, 15 March 2003.

⁹⁴ Letter, dated 18 April 2003, from Marshall Billingslea, Principal Deputy, Office of the Assistant Secretary of Defence. The letter also reiterated that “in this war, as in every war, captured enemy combatants have no right to counsel or access to courts for the purpose of challenging their detention”.

⁹⁵ Article 14, Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.

⁹⁶ The Parliamentary Under-Secretary of State for Foreign and Commonwealth Affairs, Chris Mullin, Parliamentary questions on British nationals in Guantánamo Bay, 7 July 2003.

⁹⁷ Transfer of detainees completed. Department of Defence news release, 18 July 2003.

⁹⁸ See the JTF’s official website, <http://www.nsgtmo.navy.mil/JTFgtmo/mission.html>

⁹⁹ *A place in the sun, beyond the law*. The Economist, 7 May 2003.

¹⁰⁰ E/CN.4/2003/8, 16 December 2002.

¹⁰¹ *Guantánamo Bay: The work continues*. ICRC operational update. 9 May 2003.

¹⁰² The international controversy over the photograph led Secretary Rumsfeld to acknowledge that it was “probably unfortunate” that the picture had been released, at least without better captioning. He added: “My recollection is that there’s something in the Geneva Conventions about press people being around prisoners; that - and not taking pictures and not saying who they are and not exposing them to ridicule”. Department of Defence News Briefing, 22 January 2002. Article 13 of the Geneva Convention relative to the Treatment of Prisoners of War, states: “Prisoners of war must at all times be treated humanely. Likewise prisoners of war must at all times be protected, particularly against acts of violence or intimidation and against insults and public curiosity”. By the time of its invasion of Iraq, the US administration was more *au fait* with this particular aspect of international humanitarian law, and reacted angrily to captured US soldiers being intimidated on camera. See *International standards for all*. <http://web.amnesty.org/library/Index/ENGAMR510452003>

¹⁰³ BBC TV Newsnight, 5 June 2003 (translation).

¹⁰⁴ General Comment 21, 1992.

¹⁰⁵ The National Security Strategy of the United States of America. September 2002.

¹⁰⁶ “The Medium Security Facility differs substantially from the other detention units inside Camp Delta. In this facility, detainees are housed in building complexes where each unit consists of a communal living area, with a private toilet and sink, and a larger shower and toilet room that serves the entire complex. A complex consists of four communal living rooms that can house up to 10 enemy combatants each. Detainees have a bed with a mattress, locker for storing personal items and material such as writing paper and books. Each complex also has a recreational area for playing games and team sports.” Joint Task Force Guantánamo. <http://www.nsgtmo.navy.mil/JTFgtmo/mission.html>

¹⁰⁷ Kellogg Brown & Root won the contracts to build the initial 800 cells of the Camp Delta prison (US\$32.7 million). The Pentagon’s recent decision to award this subsidiary of Halliburton the contract to fight oil well fires in Iraq, a contract awarded without competition and with the reported potential to earn nearly half a billion dollars in profit over two years, has raised concern about whether this and other US companies have received favourable treatment from the administration. Vice-President Dick Cheney was Halliburton’s chief executive from 1995 to 2000.

¹⁰⁸ The cells of Camp Delta have metal mesh walls dividing them and so prisoners are believed to be able to communicate with fellow detainees in neighbouring cells.

¹⁰⁹ Baroness Symons of Vernham Dean. Questions in the House of Lords on the UK nationals in Guantánamo Bay, 7 July 2003.

¹¹⁰ Broadcasting House, BBC Radio 4, 29 June 2003.

¹¹¹ Article 98, Third Geneva Convention and Article 125 Fourth Geneva Convention.

¹¹² Standard Minimum Rules for the Treatment of Prisoners.

¹¹³ Fox News Sunday, 27 January 2002.

¹¹⁴ Page 26 of Amnesty International's *Memorandum to the US Government on the rights of people in US custody in Afghanistan and Guantánamo Bay*, April 2002.
<http://web.amnesty.org/library/Index/ENGAMR510532002>

¹¹⁵ Department of Defence News Transcript, 4 May 2003.

¹¹⁶ See further information on Urgent Action 86/03 (AI Index: AMR 51/051/2003, 27 March).

¹¹⁷ 'They interrogated us for hours'. *Guardian* (UK). 29 October 2002.

¹¹⁸ *Today*. BBC Radio 4, 7 March 2002.

¹¹⁹ Department of Defence, Military Commission Order no 1. The commission, appointed by the officials who approve the plea agreement, has to determine the voluntary nature of the plea arrangement.

¹²⁰ *18 ex-Guantanamo captives suddenly out on Kabul street*. *New York Times*, 26 March 2003.

¹²¹ *Ex-Guantanamo inmate to sue US*. BBC News. 10 July 2003.

¹²² In June 2003, a military officer at Camp Delta confirmed that the lights are kept on all-night in the cell blocks. He stated that "if the detainee indicates to the medical personnel that the light is a problem with him, the medical personnel will make an assessment and provide the necessary equipment".

Broadcasting House. BBC Radio 4, 29 June 2003.

¹²³ Article 124 of the Fourth Geneva Convention requires that civilian internees subject to disciplinary punishments "in particular be provided with adequate bedding".

¹²⁴ *In the land of Guantánamo*, *New York Times*, 29 June 2003.

¹²⁵ Threats of transfer to Guantánamo were reportedly being used by US soldiers against civilians to gain their cooperation in the context of a poor law and order situation. BBC TV Newsnight, 23 July 2003.

¹²⁶ *Questioning terror suspects in a dark and surreal world*. *New York Times*, 9 March 2003.

¹²⁷ *Prisoners released from US base in Afghanistan*. Associated Press, 15 March 2003.

¹²⁸ *In the land of Guantánamo*, *New York Times*, 29 June 2003.

¹²⁹ *Guantánamo prisoner attempts suicide*. Associated Press, 3 June 2003. *Guantánamo detainee attempts suicide*. Associated Press, 17 July 2003.

¹³⁰ Daniel Cavoli, speaking on Broadcasting House. BBC Radio 4, 13 July 2003.

¹³¹ Antonella Notari, quoted in *The Bitterest Betrayal*. *The Guardian Weekend* (UK), 19 July 2003.

¹³² *Tales of despair from Guantánamo*, *New York Times*, 17 June 2003.

¹³³ Rule 92 of the Standard Minimum Rules for the Treatment of Prisoners states: "An untried prisoner shall be allowed to inform immediately his family of his detention and shall be given all reasonable facilities for communicating with his family and friends, and for receiving visits from them, subject only to restrictions and supervision as are necessary in the interests of the administration of justice and of the security and good order of the institution". Principle 19 of the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment states: "A detained or imprisoned person shall have the right to be visited by and to correspond with, in particular, members of his family and shall be given adequate opportunity to communicate with the outside world, subject to reasonable conditions and restrictions as specified by law or lawful regulations".

¹³⁴ Amnesty International notes that the US is a signatory to the Convention on the Rights of the Child, which requires that in matters effecting children, the best interests of the child shall be a primary consideration. As a signatory to the Convention, the USA is obliged under international law not to do anything to undermine the provisions of the treaty, pending a decision on whether to ratify it (Article 18, Vienna Convention on the Law of Treaties). The Committee on the Rights of the Child, the body established by the Convention to oversee implementation of the treaty, has indicated in another context

“that the best interests of the child and, in particular, child rights with regard to separation from parents are not fully respected in the context of maintaining contact with parents serving prison sentences.” (CRC/C/15/Add.126, Concluding Observations of the Committee on the Rights of the Child : Norway. 28/06/2000).

¹³⁵ It seems that it took six months for even the Canadian government to have access to Omar Khadr. *Canada denied access to teenager held by US in Afghanistan*. AFP. 15 September 2002.

¹³⁶ Letter to Amnesty International Secretary General Irene Khan, undated, received 8 July 2003, from Paul W. Butler, Deputy Assistant Secretary of Defence.

¹³⁷ Department of Defence News Briefing, 25 April 2003.

¹³⁸ Department of Defence News Briefing, 25 April 2003.

¹³⁹ *Young detainees*. Directorate for Public Inquiry and Analysis. 28 May 2003.

¹⁴⁰ *USA: Indecent and internationally illegal: The death penalty against child offenders* (AI Index: AMR 51/143/2002, September 2002).

¹⁴¹ Murder by an unprivileged belligerent is triable by military commission under Military Commission Instruction No. 2 of 30 April 2003. “Even an attack on a soldier would be a crime if the attacker did not enjoy “belligerent privilege” or “combatant immunity””. In the military commissions, the burden would be on the prosecution to prove that the defendant was an unprivileged belligerent.

¹⁴² *Military mulls death penalty – Toronto teen may be eligible*. Calgary Sun, 3 June 2003.

¹⁴³ The use of the death penalty against people who were under 18 years old at the time of their alleged offences is prohibited by the International Covenant on Civil and Political Rights, the Convention on the Rights of the Child and the American Convention on Human Rights. The Fourth Geneva Convention, and both Additional Protocols to the Geneva Conventions also prohibit the imposition of the death penalty against this age group.

¹⁴⁴ Vienna Convention on the Law of Treaties, Article 18.

¹⁴⁵ In its standard response on the child detainees, the Pentagon wrote that “the Taliban, who formerly ruled Afghanistan, and the international terrorist network, Al Qaeda, chose to use young people as enemy combatants.” In its letter to Amnesty International, the Pentagon wrote of the under-16-year-olds in Guantánamo that “these particular individuals were captured while actively participating in hostilities.”

¹⁴⁶ BBC TV Newsnight, 5 June 2003 (translation).

¹⁴⁷ BBC TV Newsnight, 5 June 2003 (translation).

¹⁴⁸ Letter dated 2 April 2003 from the Permanent Mission of the United States of America to the United Nations Office at Geneva addressed to the Secretariat of the Commission on Human Rights. E/CN.4/2003/G/73. 7 April 2003.

¹⁴⁹ *Alvarez-Machain v USA*, US Court of Appeals for the Ninth Circuit, 3 June 2003.

¹⁵⁰ *An uneasy routine at Cuba prison camp*. New York Times, 16 March 2002.

¹⁵¹ *Many held at Guantánamo not likely terrorists*. Los Angeles Times, 22 December 2002.

¹⁵² On 14 May 2003, four Saudi nationals were transferred to Saudi Arabia for “continued detention by the Government of Saudi Arabia”. Amnesty International reiterates that no-one should be returned to a country where they would be at risk of torture, execution or other serious human rights abuse. They should also not be transferred from one situation of prolonged untried detention to another.

¹⁵³ *‘They interrogated us for hours’*. Guardian (UK). 29 October 2002.

¹⁵⁴ Transfer of detainees completed. Department of Defence News Release, 28 October 2002.

¹⁵⁵ State Department Daily Press Briefing, 12 June 2003. Richard Boucher, the Department’s spokesman was responding to the news that the US candidate had not been elected on to the Commission by the General Assembly of the Organization of American States.

¹⁵⁶ E/CN.4/2003/8, 16 December 2002.

¹⁵⁷ *Op.cit.* E/CN.4/2003/G/73. 7 April 2003.

¹⁵⁸ Human Rights Committee. CCPR General comment 8. 30 June 1982

¹⁵⁹ General Comment no 29. Paragraphs 11 and 16. CCPR/C/21/Rev.1/Add.11. 31 August 2001.

¹⁶⁰ Advisory Opinion OC-8/87 of 30 January 1987, Annual report of the Inter-American Court, 1987, OAS/Ser.L/V/III.17 doc.13, 1987; and Judicial Guarantees in States of Emergency, Advisory Opinion OC-9/87 of 6 October 1987, Annual Report of the Inter-American Court, 1988, OAS/Ser.L/V/III.19 doc.13, 1988.

¹⁶¹ Article 18 of the Vienna Convention on the Law of Treaties.

¹⁶² Interview with Cale Ramaker, KSDK-NBC. 27 February 2002.

¹⁶³ *ICRC President meets with US officials in Washington DC*. ICRC Press Release. 28 May 2003.

¹⁶⁴ In 2002, a federal District Court had held that it lacked jurisdiction to consider complaints and petitions for *habeas corpus* brought on behalf of a number of Guantánamo detainees by their relatives. It further expressed the belief that no US court would have jurisdiction over the detainees. On 11 March 2003, the US Court of Appeals for the District of Columbia Circuit unanimously affirmed the lower court's decision. Complaints were filed on behalf of 12 Kuwaiti, two Australian, and two UK nationals. Various, the petitions had sought access to relatives and to counsel, to be informed of any charges against the detainees, release from unlawful custody, and an end to interrogations.

¹⁶⁵ *Belaid Gherebi v George Walker Bush*, US District Court for the Central District of California. Case No. CV 03-1267-AHM, Order dismissing petition for lack of jurisdiction. 13 May 2003.

¹⁶⁶ Human Rights Committee, General Comment 3, para 1. 29 July 1981.

¹⁶⁷ See, for example, Concluding observations of the Human Rights Committee: Israel, UN Doc. CCPR/C/79/Add. 93, 18 August 1998, para 10.

¹⁶⁸ *Abbasi v Secretary of State*, Court of Appeal England and Wales, 6 November 2002. There are believed to be nine UK nationals in Guantánamo Bay: Feroz Abbasi, Moazzam Begg, Shafiq Rasul, Asif Iqbal, Ruhul Ahmed, Martin Mubanga, Jamal Udeen, Richard Belmar and Tarek Dergoul. In addition, Bisher Al-Rawi, an Iraqi national legally resident in the United Kingdom, and Jamil Al Banna, a Jordanian national with refugee status in the UK were transferred to Camp Delta from Gambia via Bagram in 2003. A 24-year-old Ugandan national, who had resided in the UK from the age of 14 (his mother has UK citizenship), is also held in Camp Delta.

¹⁶⁹ *Johnson v Eisentrager*, 339 US 763 (1950), Justice Black dissenting (joined by Justices Douglas and Burton).

¹⁷⁰ *US Court decision on Guantánamo detainees has serious implications for rule of law, says UN rights expert*. United Nations Press Release, 12 March 2003.

¹⁷¹ Opinion No. 5/2003 (United States of America), 8 May 2003.

¹⁷² *Vindicating the rule of law: Balancing competing demands for justice*. Paper presented by US Supreme Court Justice Sandra Day O'Connor to Conference on Democracy and the Rule of Law in a Changing World Order, 7 March 2000.

¹⁷³ James Ziglar, quoted in *America's secret prisoners*. Newsweek, 18 June 2003.

¹⁷⁴ Ambassador Cofer Black, Coordinator for Counterterrorism. Testimony before the House International Relations Committee, Subcommittee on International Terrorism, Nonproliferation and Human Rights. Washington, DC. 26 March 2003.

¹⁷⁵ Amnesty International Urgent Action <http://web.amnesty.org/library/Index/ENGAMR510932003>

¹⁷⁶ *US denies involvement in arrest of terrorism suspects*. African Church Information Service. allAfrica.com, 4 August 2003.

¹⁷⁷ Terror suspect flown out of Pakistan. Associated Press, 14 July 2003.

¹⁷⁸ Letter to President Bush from Secretary General Irene Khan, dated 10 April 2002.

¹⁷⁹ Letter to Human Rights Watch, dated 2 April 2003, from the Pentagon’s General Counsel, William Haynes.

¹⁸⁰ *US decries abuse but defends interrogations*. Washington Post, 26 December 2002.

¹⁸¹ See Amnesty International Urgent Action 314/02, AMR 51/159/2002, 21 October 2002 and updates.

¹⁸² Ottawa stumped by Syria tipoff. National Post (Canada), 30 July 2003.

¹⁸³ Letter to US Senator Patrick J. Leahy from William J. Haynes, General Counsel of the Department of Defence, dated 25 June 2003.

¹⁸⁴ *Id.*

¹⁸⁵ *US behind secret transfer of terror suspects*. Washington Post, 11 March 2002.

¹⁸⁶ *Al Qaeda recruiter reportedly tortured*. Washington Post, 31 January 2003.

¹⁸⁷ Amnesty International Report, 2003.

¹⁸⁸ *US decries abuse but defends interrogations*. Washington Post, 26 December 2002.

¹⁸⁹ *Questioning terror suspects in a dark and surreal world*. New York Times, 9 March 2003.

¹⁹⁰ *US decries abuse but defends interrogations*. Washington Post, 26 December 2002.

¹⁹¹ General Comment 20, para. 11.

¹⁹² For example, see State of the Union Address, 29 January 2002.

¹⁹³ President Bush, Prime Minister Blair discuss war on terrorism. White House press conference, 17 July 2003.

¹⁹⁴ See also: *UK – Government must act now on behalf of Guantánamo detainees*. 11 July 2003, available at <http://web.amnesty.org/library/Index/ENGEUR450192003>

¹⁹⁵ *Letters home from Guantánamo Bay*. BBC News Online, 17 July 2003.

¹⁹⁶ Baroness Symons of Vernham Dean. Questions in the House of Lords on the UK nationals in Guantánamo Bay, 7 July 2003.

¹⁹⁷ *There are many other Guantánamo prisoners*. The Independent (UK), 21 July 2003.

¹⁹⁸ The World this Weekend. BBC Radio 4, 13 July 2003.

¹⁹⁹ According to the Department of Defence, President Bush had “determined that there is reason to believe that each of these enemy combatants was a member of *al-Qa’ida* or was otherwise involved in terrorism directed against the United States”. The Pentagon did not immediately make the identities of the six public, stating that because “no charges against any of the detainees have been approved, their names will not be released”. However, the families of three Guantánamo detainees were told by their governments that their relative was among the six – the three men were UK nationals Moazzam Begg and Feroz Abbasi, and Australian David Hicks. Amnesty International has received information that among the other three detainees is at least one Yemeni and one Pakistani. Following the naming of the detainees, it became the responsibility of the “appointing authority”, who at the time of writing was Deputy Secretary of Defence Paul Wolfowitz, to decide whether to approve any charges brought by military prosecutors against any of the six detainees and whether to appoint a military commission to try those charged.

²⁰⁰ Notably, the procedures noted that in the event of any inconsistency between the procedures and the Order, “the provisions of the President’s Military Order shall govern”.

²⁰¹ For example: attacking civilians, attacking civilian objects, pillaging, taking hostages, employing poison or analogous weapons, torture, causing serious injury, rape, terrorism, spying, aiding the enemy.

²⁰² See http://www.access.gpo.gov/su_docs/fedreg/a030701c.html

²⁰³ Briefing on Military Commissions, 22 May 2003.

²⁰⁴ As executive officials, the impartiality of its members could not be guaranteed. None of the commission members would have the same security of tenure as civilian judges. In fact, any of them, including the Presiding Officer, could be removed by the Secretary of Defence “for good cause”.

²⁰⁵ Article 102 holds that a “prisoner of war can be validly sentenced only if the sentence has been pronounced by the same courts according to the same procedure as in the case of members of the armed forces of the Detaining Power”. Article 130 provides that “wilfully depriving a prisoner of war of the rights of fair and regular trial prescribed in this Convention” is a grave breach of that Convention – that is, it is a war crime. Article 75 of Additional Protocol 1, recognized by the USA as reflecting customary international law, states: “No sentence may be passed and no penalty may be executed on a person found guilty of a penal offence related to the armed conflict except pursuant to a conviction pronounced by an impartial and regularly constituted court respecting the generally recognized principles of regular judicial procedure”. The President Bush’s Military Order of 13 November 2001 expressly states that “it is not practicable to apply in military commissions under this order the principles of law and the rules of evidence generally recognized in the trial of criminal cases in the United States district courts”.

²⁰⁶ See pages 37-40 of Amnesty International’s April 2002 *Memorandum to the US Government* <http://web.amnesty.org/library/Index/ENGAMR510532002>

²⁰⁷ President Bush, Prime Minister Blair discuss war on terrorism. White House press conference, 17 July 2003.

²⁰⁸ The Human Rights Committee found that this right was violated in Uruguay when a defendant was forced to accept military counsel, although a civilian attorney was willing to represent him. Under the USA’s Uniform Code of Military Justice, if a US soldier facing a court martial decides to retain a civilian lawyer, he or she can dismiss the military lawyer.

²⁰⁹ *Guantanamo: Little hope for zealous advocacy*. The Champion, July 2003.

²¹⁰ Under the normal military justice system in the USA, defendants have the right of appeal to the Court of Appeals for the Armed Forces. Its five judges are civilians, appointed for 15-year terms. The decision of this appellate court is also eligible for US Supreme Court review. In the case of prisoners of war, Article 106 of the Third Geneva Convention holds that they “shall have, in the same manner as the members of the armed forces of the Detaining Power, the right of appeal or petition from any sentence pronounced upon him”.

²¹¹ The Human Rights Committee, in its authoritative interpretation of the ICCPR, has stated: “Non-discrimination, together with equality before the law and equal protection of the law without any discrimination, constitute a basic and general principle relating to the protection of human rights”.

²¹² The United Nations Working Group on Arbitrary Detention has said: “One of the most serious causes of arbitrary detention is the existence of special courts, military or otherwise, regardless of what they are called. Even if such courts are not in themselves prohibited by the International Covenant on Civil and Political Rights, the Working Group has none the less found by experience that virtually none of them respects the guarantees of the right to a fair trial enshrined in the Universal Declaration of Human Rights and the said Covenant.” The Human Rights Committee has also stated that the jurisdiction of special courts should be strictly defined by law. In its concluding observations on Iraq in 1997, for example, the Committee “expressed concern that in addition to the list of offences which were triable in special courts in Iraq, the Minister of the Interior and the Office of the President had discretionary authority to refer any other cases to these courts.” As already stated, President Bush’s Military Order provides for sweeping military jurisdiction over a potentially wide-range of individuals, and is open-ended. Furthermore, even the Pentagon’s broad range of crimes over which the military commissions have jurisdiction is a non-exhaustive list, and it remains the case that: “Commissions established hereunder shall have jurisdiction over violations of the laws of war and all other offenses triable by military commission”

²¹³ Principle 5 of the UN Basic Principles on the Independence of the Judiciary, states: “Everyone shall have the right to be tried by ordinary courts or tribunals using established legal procedures. Tribunals

that do not use the duly established procedures of the legal process shall not be created to displace the jurisdiction belonging to the ordinary courts or judicial tribunals.”

²¹⁴ Speech by the President of the Parliamentary Assembly of the Council of Europe Peter Schieder at the opening of the summer 2003 part-session of the Assembly. Strasbourg. 23 June 2003.

²¹⁵ See *The Texas clemency memos*. By Alan Berlow. Atlantic Monthly, July/August 2003.

²¹⁶ For some examples, see *USA: Arbitrary, discriminatory and cruel: an aide-mémoire to 25 years of judicial killing*, <http://web.amnesty.org/library/Index/ENGAMR510032002>. As President, Mr Bush refused to intervene to stop the execution of Juan Raul Garza in 2001 despite a finding by the Inter-American Commission on Human Rights that Garza’s trial had been unfair and that his execution would violate the USA’s international obligations.

²¹⁷ Also, Article 75.7 states that anyone accused of war crimes or crimes against humanity “should be submitted for the purpose of prosecution and trial in accordance with the applicable rules of international law”.

²¹⁸ General Comment 6, 1982.

²¹⁹ General Comment 6, 1982.

²²⁰ General Comment 29, 31 August 2001.

²²¹ *Dissent on detention*. Washington Post, 20 July 2003.

²²² E/CN.4/2003/8, 16 December 2002.

²²³ Transcript of the Attorney General John Ashcroft regarding the transfer of Abdullah Al Muhajir (born Jose Padilla) to the Department of Defence as an enemy combatant, 10 June 2002.

²²⁴ *Hamdi v Rumsfeld*, US Court of Appeals for the Fourth Circuit, 9 July 2003. Denial of petition for a rehearing *en banc*.

²²⁵ Department of Defence News Release, 23 June 2003.

²²⁶ “*Enemy combatants*” cast into a constitutional hell. By Andrew P. Napolitano. Los Angeles Times, 27 June 2003.